

# “Murder, Pennsylvania Style”: Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions

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In 1794, Pennsylvania adopted a homicide law that other States from Maine to California have imitated.<sup>1</sup> The result is called the “Pennsylvania pattern.” It features two degrees of

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<sup>1</sup> See *infra* authorities cited in note 15. See also Cal. Penal Code §§ 187-93 (West 2005) (defining two degrees of murder and three lesser offenses); Maine Rev. Stat. Ann. § 201, Comment (West 2005) (Maine formerly followed the Pennsylvania pattern, with first- and second-degree murder, but eliminated degrees in 1977).

murder, first and second, both of which require proof of malice aforethought, and it typically is supplemented by lesser included offenses of manslaughter or negligent homicide that vary with the jurisdiction.<sup>2</sup> The purpose of this Eighteenth-Century legislation was to limit the reach of capital punishment, although this function no longer is needed.<sup>3</sup> The thesis of this article is that the Pennsylvania pattern produces poor crime definition, in spite of its surprising staying power, even today, across the country. The most compelling examples of its deficiencies are probably to be found in the homicide jurisprudence of California, and this article therefore concentrates heavily on that State; but the concepts developed here apply to every jurisdiction that uses the Pennsylvania formulation.

One factor that makes California a striking illustration of the Pennsylvania pattern's obsolescence is that the law of California usually innovates. It stays contemporary, or at least this has always been my impression. California gave us the impetus for *Tarasoff* liability, and it gave us strict legal controls on city planning.<sup>4</sup> Voters in that State have acted forcefully to adopt by-the-numbers tax limits, serious restrictions on affirmative action, and tighter treatment of probationers.<sup>5</sup> The results in some cases have proved less than felicitous,<sup>6</sup> but it has always

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<sup>2</sup> See *infra* note 15 and accompanying text.

<sup>3</sup> See *infra* note 14 and accompanying text.

<sup>4</sup> *Tarasoff v. Regents of University of California*, 17 Cal.3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), imposes liability on a psychotherapist for certain kinds of tortious conduct of a patient, if the therapist fails to warn a prospective victim in specified circumstances of potential violence. But see *infra* note 6. As for city planning, *cf.*, *e.g.*, *Leshar Communications, Inc. v. City of Walnut Creek*, 52 Cal.3d 531, 802 P.2d 317, 277 Cal. Rptr. 1 (1990) (invalidating a city's growth-limitation law, adopted by voter initiative, on grounds of inconsistency with the city's general plan as well as inconsistency with legislation requiring appropriate conformity to regional housing needs).

<sup>5</sup> See *Serrano v. Priest*, 557 P.2d 929 (1976) (holding existing system of financing schools unconstitutional under equal protection clause of state constitution); *Serrano v. Priest*, 226 Cal. Rptr. 584 (1986) (upholding level of spending on education as satisfying state equal protection requirement in light of Proposition 13, which limited taxes); *Board of Education v. Superior Court*, 61 Cal. App.4<sup>th</sup> 411 (1998) (providing history of court's upholding of the constitutionality of Proposition 209, limiting affirmative action); *Coalition for Economic Equity v. Wilson*, 107 F.3d 704, reh'g denied, 122 F.3d 692 (9<sup>th</sup> Cir. 1997) (federal lawsuit addressing constitutionality of Proposition 209); *John L. v. People*, 88 Cal. App. 4<sup>th</sup> 715 (2001) (upholding certain provisions of Proposition 21, including authorization of probation revocation and imposition of "more restrictive custody" with lowered proof standard).

seemed to me that California has been willing to change its laws.

It is surprising, therefore, that the California law of homicide has remained as stodgy as it has. The reason is that it still conforms to the old-time Pennsylvania pattern of 1794. It uses antiquated definitions and gradations of homicide.<sup>7</sup> Decisions that contradict contemporary attitudes about the severity of murders remain in place, approved as authority, even though other decisions seem to have overruled them *sub silentio*.<sup>8</sup> In fact, California's murder jurisprudence has become so confused under the influence of the Pennsylvania pattern that one can only wonder pessimistically at the impression made on jurors who conscientiously try to follow the all-over-the-map instructions that result.<sup>9</sup> The state legislature has changed a few doctrines around the edges,<sup>10</sup> but the problem lies deeper: in fundamental definitions of homicidal crimes that, under the Pennsylvania pattern, are based on oxymoron, misnomer, metaphor, and disproportion.

The reader should not get the impression that I favor California-bashing (or for that matter, Pennsylvania-bashing), because I find many aspects of California law to admire.<sup>11</sup> But to put it bluntly, I think the Pennsylvania pattern is an anachronism, and by way of contrast, I find

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<sup>6</sup> For example, the aftermath of *Tarasoff*, see *supra* note 4, included a proliferation of claims asserting that psychotherapists were negligent in failing to predict violence from diffuse and indirect indications. The legislature acted to contain this liability by passing Cal. Civil Code § 43.92 (West 2005), which provides that psychotherapists have no duty to warn except when the patient has uttered a "serious threat of physical violence against an identifiable victim." Even after this legislation, there are dubious suits. *E.g.*, *Calderon v. Glick*, 131 Cal. App. 4<sup>th</sup> 224, 31 Cal. Rptr. 707 (2005) (rejecting suit prohibited by § 43.92).

<sup>7</sup> See *infra* Pts. IA, IIA, IIB of this Article.

<sup>8</sup> See *infra*, e.g., Pt. IB of this Article.

<sup>9</sup> See *infra*, e.g., Pt. IB2a of this Article.

<sup>10</sup> See *infra*, e.g., Part IC of this Article.

<sup>11</sup> Compare, e.g., California authorities cited in *supra* note 2 (limiting city's regulation of growth to achieve compliance with statutes requiring a general plan and adequate housing) with *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 234 (Tex. 1994) (holding that zoning change that frustrated investment in housing development was not unconstitutional or other illegal, in absence of legislative standards). Texas permitted a city downzone so as to pull the rug out from beneath a landowner who had made enormous investments in a new housing development that was lawful under pre-existing provisions. California law seems, admirably, to limit this result.

the homicide law of my State, Texas, preferable in virtually every respect in which it differs. Texas revised its Penal Code in 1973 in a way that was heavily influenced by the Model Penal Code,<sup>12</sup> although it contains important departures from the MPC. The revision was not pain-free. In fact, it was wrenching.<sup>13</sup> But today, Texans are governed by murder laws that say what they mean, reflect the people's values, produce crime gradations roughly corresponding to blameworthiness, and communicate the rules consistently to judges and jurors.<sup>14</sup>

It is not so with the Pennsylvania pattern.<sup>15</sup> Admittedly, the doctrines that this article will analyze are traditional.<sup>16</sup> Some, in fact, come to us from time immemorial, with a patina of venerable fondness attached to them.<sup>17</sup> Tradition and experience can furnish sound reasons for keeping the wisdom of the past. But imagine a Pennsylvanian traveling to work on the local freeway in a horse and buggy, merely because that method of travel happens to be traditional. Except perhaps in Amish territory, onlookers rightly would suggest that the traveler should consider other alternatives. So it is here: clumsy crime definition should not control us merely because it has been used for a long time.

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<sup>12</sup> See *infra*, e.g., Pt. ID of this Article.

<sup>13</sup> The redefinition of virtually every offense led to a large number of wholesale reversals for reasons having nothing to do with guilt. For example, in *Day v. State*, 532 S.W.2d 302 (Tex. Crim. 1976), a burglary case, the trial court did not instruct the jury on the offense of criminal trespass, which the Court of Criminal Appeals held was a lesser included offense. The court's holding was far from obvious, required an extensive opinion on rehearing, and produced two separate dissents and a separate concurrence. Its effect, however, was widespread and can be inferred to have resulted in reversal of every pending burglary case presenting the issue. Several cases held that indictments that apparently were standard forms applicable to many cases were "fundamentally defective" because they did not allege particulars of certain kinds, when the Penal Code did not call expressly for those particulars. *E.g.*, *Smith v. State*, 571 S.W.2d 917 (Tex. Crim. 1978) (ordering dismissal of indictment after conviction because indictment did not include certain language of statute that could be assumed to exist under other language, even though jury was properly instructed on all elements).

<sup>14</sup> See *infra*, e.g., Pt. ID of this Article.

<sup>15</sup> Pennsylvania enacted its statute in 1794. A majority of the States ultimately followed Pennsylvania's lead. See generally Tom Stacy, *Changing Paradigms in the Law of Homicide*, 62 OHIO ST. L.J. 1007, 1013-14 (2001). See also DAVID CRUMP, ET AL., *CRIMINAL LAW: CASES, STATUTES, AND LAWYERING STRATEGIES* 32-33 (2005) (explaining the Pennsylvania pattern).

<sup>16</sup> See *infra*, e.g., Pt. IA of this Article.

This article begins with the most serious homicidal crime in the Pennsylvania pattern. Specifically, it examines the statutory distinction between first-and second-degree murder, a distinction that produces significant differences in the treatment of convicted murderers but that is indeterminate, in many kinds of cases, almost to the point of meaninglessness.<sup>18</sup> The article then contrasts the Pennsylvania pattern, with an emphasis on its California embodiment, to the Model Penal Code, as it is reflected in the Texas murder statute.<sup>19</sup> Next, the article considers the basic definition of murder under the Pennsylvania pattern, which is expressed in a double misnomer and which makes the crime difficult to distinguish from lower degrees of homicide. Again, the article compares the Pennsylvania pattern to the different MPC-Texas approach. Later sections analyze the Pennsylvania-California and MPC-Texas treatments of voluntary manslaughter, involuntary manslaughter, and felony murder.<sup>20</sup> A final section contains the author's conclusions, which include the concern that the Pennsylvania pattern of homicide law encourages both inappropriate acquittals and inappropriate convictions to a degree that could be avoided by revised formulations.

Frankly, the scope of this article is ambitious, and maybe there is a danger that it is too ambitious. Most articles on homicide tend to confine themselves—sensibly—to single jurisdictions or to single concepts.<sup>21</sup> But homicide law usually is defined in terms of multiple levels of closely-related crimes, and an examination of one offense may not help to expose overlaps, confusion, or gaps in overall coverage. And examination of a single jurisdiction may prove less valuable than a comparison of different approaches. This article therefore undertakes

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<sup>17</sup> For example, the term “malice aforethought” evolved over several centuries. See WAYNE R. LAFAYE, CRIMINAL LAW § 14.1 (4<sup>th</sup> ed. 2003) (hereinafter cited as LAFAYE).

<sup>18</sup> See *infra* Pt. IA-C of this Article.

<sup>19</sup> See *infra* Pt. ID of this Article.

<sup>20</sup> See *infra* Pt. II-IV of this Article.

a broader analysis. This is one reason for its emphasis on one Pennsylvania-pattern State (California), and it also is the reason the article will not analyze every detail for most homicidal crimes (particularly for the felony murder rule). Still, I hope to say something about the entire Pennsylvania pattern, from top to bottom, that will be useful throughout the States that follow it, and to suggest concrete solutions to most of the problems that my article will raise.

**PRELIMINARY STATEMENT: TWO STATUTORY PATTERNS,  
DIFFERING BOTH IN CONCEPT AND IN ORIGIN**

Because this article concentrates on two distinct patterns of homicide law, it may be best to sketch them first. The California system follows the Pennsylvania pattern. It consists of (1) first degree murder, (2) second degree murder, (3) voluntary manslaughter, and (4) lesser manslaughters. Murder requires “malice aforethought”: a term of art that includes both intentional and unintentional killings. First degree murder also requires premeditation and deliberation, while second degree requires only malice. Voluntary manslaughter includes certain passion killings, and involuntary manslaughter requires criminal negligence. Felony murder suffices for either first-degree or second-degree, depending on the circumstances. This is a broad brush depiction, and there are many issues underlying the terminology.

The Model Penal Code defines crimes of (1) murder, manslaughter (which may be either (2) voluntary or (3) involuntary), and (4) criminally negligent homicide. There is only one degree of murder, but it includes some unintended killings. The MPC abolishes malice and defines mens rea precisely. The Texas law of homicide follows the core MPC definitions. There are, however, some differences. For example, Texas defines a version of felony murder, whereas the MPC does not. Texas also abolishes voluntary manslaughter; the offense remains murder, but under specified circumstances, it is subject to a lesser maximum sentence. The effect is conceptually

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<sup>21</sup> See *infra* authorities cited in notes 56, 101, 118, 192, 217, 258, 278, 287, 341, 352.

similar to retention of voluntary manslaughter, but with subtle differences. And there are further changes from the MPC, although its thrust is preserved in Texas.

There is a fundamental difference, too, in how the California and Texas systems developed. Although now embodied in statutes, the Pennsylvania pattern and the California approach reflect their common law origins. Rather than embodying a single plan with grades calibrated together like those of the MPC, the Pennsylvania-California structure evolved gradually, beginning with one crime, unlawful homicide, then split into murder and manslaughter, and then only much later divided murder into degrees. The difference in their origins informs the discussion of the respective homicide schemes.

## **I. THE PREMEDITATION-DELIBERATION FORMULA**

The most serious offense in the Pennsylvania pattern is first-degree murder. This crime is separated from second-degree murder by the premeditation-deliberation formula. Specifically, first-degree murder generally requires a “deliberate” and “premeditated” killing.<sup>22</sup> This is a historical, traditional formulation, even though it is a creature of statute<sup>23</sup> rather than common law. The difference between first- and second-degree murder is significant because in California, for example, a first-degree conviction carries a minimum sentence of twenty-five

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<sup>22</sup> See Cal. Penal Code § 189 (West 2005). See generally LAURIE L. LEVENSON & ALEX RICCIARDULLI, CALIFORNIA CRIMINAL LAW § 5:11-5:16 (2d ed. 2005) [hereinafter cited as LEVENSON et al.] (discussing this kind of murder).

<sup>23</sup> See LAFAYE § 14.7. It should be added that the more basic common law concept of malice may have incorporated a kind of “premeditation” at its inception, but if so, it was different in both meaning and purpose. See *infra* note 196.

years and can subject the defendant to the death penalty<sup>24</sup> or life imprisonment without the possibility of parole.<sup>25</sup> Second-degree murder, by way of contrast, carries a fifteen-year minimum.<sup>26</sup>

There are other ways of committing first-degree murder. The California statute, again influenced by Pennsylvania, also includes murder committed by “lying in wait,” “poisons,” and certain other kinds of specific means.<sup>27</sup> This article will consider these provisions later. They are gap-fillers that indirectly prove the point that the premeditation-deliberation formula is inadequate to cover the subject.<sup>28</sup> Most first-degree cases, however, still depend upon premeditation and deliberation.

Evidently, the policy underlying the Pennsylvania pattern is that a single factor distinguishes the most serious murders: a mens rea that combines “premeditation” and “deliberation.” One might argue that, in Pennsylvania, the intelligent planner—the kind of genteel murderer one meets in an Agatha Christie novel—is the prototype for the worst of the worst, although this argument is overly simplistic. The problem is, the line that Pennsylvania draws between first- and second-degree murder is vague, indeterminate, and shifting. It produces arbitrary results.<sup>29</sup> Furthermore, by adopting a mens rea of premeditation and deliberation as the sole determinant of blameworthiness, the Pennsylvania pattern sometimes gets it backward, punishing lesser crimes more severely and depreciating the seriousness of more

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<sup>24</sup> Capital punishment need not, however, be related to degrees of murder. It depends, instead, on specific factors separate from the murder conviction itself. *See infra* note 141 and accompanying text. Thus, the persistence of the Pennsylvania pattern is surprising in light of its initial purpose of restricting capital punishment, a purpose for which it no longer is needed. *See supra* note 3 and accompanying text.

<sup>25</sup> Cal. Penal Code § 190 (West 2005).

<sup>26</sup> *Id.*

<sup>27</sup> Cal. Penal Code § 189 (West 2005). *See also infra* Pt. IC of this article (analyzing these provisions).

<sup>28</sup> *See infra* Pt. IC of this Article.

<sup>29</sup> *See infra* Pt. IB of this Article.



blameworthy offenses.<sup>30</sup>

It should be added that, by using this top-to-bottom approach and beginning with the most serious homicidal crime, this article risks losing sight of the history of the Pennsylvania pattern. In fact, murder existed long before first-degree murder was invented. Furthermore, first-degree murder itself is an old idea. It dates from the Eighteenth Century, and the California statute defining this crime was adopted more than a hundred years before the first of the cases that this article will discuss. But examining the offenses from top to bottom has an organizational simplicity to it, and that is why this article uses this approach.

#### ***A. The Search for Meaning: Premeditation and Deliberation in People v. Anderson***

The poster case for what is wrong with the premeditation-deliberation formula is the California Supreme Court's decision in *People v. Anderson*.<sup>31</sup> Although *Anderson* was decided during the 1960's, and has undergone some amount of modification, it still is part of the law today.<sup>32</sup> The murder in *Anderson* was particularly brutal. Ironically, however, the very fact that the killing was random, violent, and indiscriminate—factors that, one might think, would have aggravated the crime—resulted in exonerating the defendant of first-degree murder. Thus begins our strange journey: with a murder that was random, violent, and indiscriminate, which under the Pennsylvania pattern, can become a factor in mitigation.<sup>33</sup>

##### **1. The Murder in *Anderson***

Anderson lived with a Mrs. Hammond, whose youngest daughter, Victoria, was ten years

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<sup>30</sup> Cf. notes 65-69 and accompanying text (comparing cases).

<sup>31</sup> 447 P.2d 942 (Cal. 1968) (en banc).

<sup>32</sup> See *infra* Pt. IB2 of this Article.

<sup>33</sup> See *infra* note 56 and accompanying text.

old.<sup>34</sup> On the morning of the murder, Mrs. Hammond left for work, leaving Victoria at home with the defendant. Anderson was on his third day in a drinking binge.<sup>35</sup> Mrs. Hammond's son Kenneth came home from school in the afternoon and heard sounds like boxes being moved and someone cleaning up. He saw blood on the kitchen floor, and the defendant, dressed only in slacks, falsely explained that he had cut himself.<sup>36</sup> Mrs. Hammond returned, and the defendant explained the blood by telling her that Kenneth had cut himself.<sup>37</sup> When Kenneth denied it, the defendant invented a third story: he told Mrs. Hammond that Victoria had cut herself but that the cut was not serious. He further falsely explained that Victoria was at a friend's for dinner.<sup>38</sup> Kenneth had a "weird" feeling, and so he looked into Victoria's room. He found her nude, bloody body under some boxes and blankets on the floor and ran out of the room screaming that Anderson had killed Victoria.<sup>39</sup>

The arresting officer found Anderson's blood-spotted shorts on a chair in the living room and defendant's socks, with blood encrusted on the soles, in the master bedroom. The evidence established that Victoria's torn and bloodstained dress had been ripped from her and her clothes, including her panties out of which the crotch had been torn, were found in various rooms of the house. There were bloody footprints matching the size of the victim's leading from the master bedroom to Victoria's room, and there was blood in almost every room, including the kitchen, which appeared to have been mopped.<sup>40</sup> Over sixty wounds were found on Victoria's body. The cuts extended all over her, including one from the rectum through the vagina, and including the

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<sup>34</sup> 447 P.2d at 943-44.

<sup>35</sup> *Id.* at 944-45.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 945.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 944.

<sup>40</sup> *Id.* at 945.

partial cutting off of her tongue. Some of the wounds, including the vaginal ones, were post-mortem.<sup>41</sup>

The California Supreme Court defined the issue by saying, “We must, in the absence of substantial evidence to support the verdict of first-degree murder, reduce the conviction to second-degree murder.”<sup>42</sup> The jury had convicted Anderson of first-degree murder and fixed the penalty at death.<sup>43</sup> Evidently, the jury concluded that infliction of sixty stab wounds on a ten-year-old child, during the course of activity that involved tearing off her clothes, tearing her panties, and chasing her throughout the house while she bled profusely enough to leave footprints from one room to the next and blood in nearly every part of the house, was sufficient to show a deliberate and premeditated killing. But the California Supreme Court rejected the jury’s seemingly straightforward reasoning and summarized the People’s case as follows:<sup>44</sup>

Viewing the evidence in a light most favorable to the judgment, the first degree conviction must rest upon the following supporting proof: when Kenneth arrived home from school he found the doors locked, and when the police officers arrived to arrest defendant they found the shades in the front room down; defendant apparently had attempted to clean up the bloodstained kitchen, and had fabricated conflicting explanations of the blood that Kenneth noticed in the kitchen, the blood that Victoria's mother observed in the living room, and Victoria's absence on the evening of the killing; defendant had stabbed Victoria repeatedly and had inflicted a post mortem rectal-vaginal wound; bloodstains were found in several rooms of the house; Victoria's bloodstained and shredded dress was found under her bed next to which her nude body was discovered under a pile of boxes and blankets; Victoria's slip, with the straps torn off, was found under the bed in the master bedroom; the crotch was ripped out of Victoria's bloodsoaked panties; and the only bloodstained clothes of defendant's which were discovered were his socks and his shorts, from which facts the People argue that defendant was almost nude during the attack. . . .

The court acknowledged, “the legislative definition of the degrees of murder leaves much to the

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 946-47.

<sup>43</sup> *Id.* at 943.

<sup>44</sup> *Id.* at 947.

discretion of the jury in many cases.” That discretion, however, “must have a sound factual basis for its exercise.”<sup>45</sup> Here, according to the Court, there was no “sound factual basis” for the jury’s exercise of discretion to find Pennsylvania-style first-degree murder.<sup>46</sup>

## **2. The “*Anderson* Factors”: Redefining Premeditation in Terms of “‘Planning’ Activity,” “Motive,” and “Particular and Exacting” Means**

The *Anderson* court began by identifying factors that it considered insufficient for first-degree murder. It then identified three evidentiary characteristics that it found controlling. Finally, it concluded that all of the required characteristics were absent. Each of these steps in the court’s reasoning is subject to criticism.

(a) *Factors That Are Not Enough, According to Anderson.* The court considered it “well established” that “the brutality of a killing cannot in itself support a finding [of] premeditation and deliberation.” Furthermore, the court cited authority to the effect that “multiple acts of violence on the victim” are insufficient to show “careful thought and weighing of considerations.”<sup>47</sup> Furthermore, an inexcusable and frenzied killing was less likely to qualify as premeditated or deliberate, because it supported the inference that the killing resulted from a “random,” “violent,” and “indiscriminate” attack, “rather than from deliberately placed wounds inflicted according to a preconceived design.”<sup>48</sup>

The court recognized “the need to clarify the difference between the two degrees of murder” and the bases upon which a reviewing court might find that “the evidence is sufficient” for first-degree murder. Therefore, the court proposed to set forth “standards . . . for the kind of

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 947-48.

<sup>47</sup> *Id.* at 947.

<sup>48</sup> *Id.* at 952.

evidence which is sufficient to sustain a finding of premeditation and deliberation.”<sup>49</sup> Part of the court’s concern reflected a legitimate effort to conform faithfully to the legislative intent expressed in the language of the statute. “[L]egislative classification of murder into two degrees would be meaningless if ‘deliberation’ and ‘premeditation’ were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill.”<sup>50</sup> Therefore, the *Anderson* court saw a need to define premeditation and deliberation with narrow evidentiary requirements.

(b) *The Anderson Factors*. The court then set out three types of evidence that it considered relevant to the premeditation-deliberation issue.<sup>51</sup>

The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as “*planning*” activity; (2) facts about the defendant’s prior relationship and/or conduct with the victim from which the jury could reasonably infer a “*motive*” to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of “a pre-existing reflection” and “careful thought and weighing of considerations” rather than “mere unconsidered or rash impulse hastily executed”; (3) facts about the nature of the killing from which the jury could infer that the *manner of killing was so particular and exacting* that the defendant must have intentionally killed according to a “preconceived design” to take his victim’s life in a particular way for a “reason” which the jury can reasonably infer from facts of type (1) or (2).

In summary, premeditation and deliberation could be made out by evidence of (1) “‘planning’ activity,” (2) “‘motive,’” and (3) a “‘particular and exacting’ ‘manner of killing’ that evidenced a “‘preconceived design.’”

The court also provided standards about the weight to be given the three factors in

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<sup>49</sup> *Id.* at 948.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 949 (emphasis added). See generally LEVENSON § 5.12 (discussing *Anderson*).

determining whether the evidence was sufficient to show premeditation and deliberation.<sup>52</sup>

Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3). . . .

In other words, the first factor, planning activity, seems to have emerged as paramount: the only factor that could carry the day alone, if supported by “extremely strong evidence.” Motive could suffice if combined with either “planning activity” or a “particular and exacting” manner of killing, but the manner of killing alone, by implication, would be insufficient.

From there, it was downhill all the way as the court consigned the prosecution’s case to meaninglessness. The court found no evidence of “any conduct by defendant prior to the killing which would indicate that he was planning anything, felonious or otherwise.”<sup>53</sup> The infliction of sixty stab wounds, even when coupled with evidence that the defendant pursued ten-year-old Victoria in such a manner as to leave blood in most every room, did not, according to this court, show a design to kill. Also, in the court’s view, there was no evidence of “any behavior towards Victoria from which the jury could reasonably infer that defendant had a ‘motive’ or desire to sexually attack and/or kill her,”<sup>54</sup> although the court did not tell us what other significance the tearing of Victoria’s clothes and panties might have had when combined with Anderson’s own state of undress. Finally, according to the court, the “manner of killing and the condition of the body” could not support an inference of “deliberately placed wounds inflicted according a preconceived design.”<sup>55</sup> The court did not explain why sixty stab wounds, inflicted during the bloody pursuit of a ten-year-old child whose panties and dress had been shredded, did not show a

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 952.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

design to kill, although it did characterize these facts as “random,” “violent,” and “indiscriminate.”

Therefore, Victoria’s killing was not first-degree murder. It was only second-degree, punishable by a minimum of fifteen years. The jury’s evaluation of the crime as among the most serious and blameworthy to be found among California offenses, and its decision to impose the most severe available sentence, were not consistent with California jurisprudence.

***B. Evaluating Anderson: Bad Judicial Reasoning? A Bad Statute? Both? Or Neither?***

The holding in *Anderson*, understandably, has been the subject of criticism.<sup>56</sup> Here, this article will consider four possibilities for evaluating the decision. The first is that the court failed to consider the evidence properly. The justices invented their own three-factor standard and construed the evidence to fit their idiosyncratic preferences. In this view, the legislation is not the problem; the problem is that the court usurped the function of the factfinder. The second possibility, however, is that the statute is poorly conceived, and that the *Anderson* result is defective because the Pennsylvania pattern furnishes a poor definition of its most severe crime. According to this view, the California Supreme Court did what it had to do in its judicial role, by faithfully carrying out the legislative command. And after all, the statute existed long before *Anderson*. It presented the same kinds of interpretive difficulties before the court wrestled with them in that case, and although the difficulties were the subject of pointed criticisms, the legislature never acted. It left the court to clean up the mess. Third, it is possible that both of the

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<sup>56</sup> E.g., Matthew A. Pauley, *Murder by Premeditation*, 36 AM. CRIM. L. REV. 145, 159-66 (1999); Bruce Ledewitz, *Mr. Carroll’s Mental State, or What Is Meant by Intent*, 38 AM. CRIM. L. REV. 71, 108-09 & n.163 (2001); Charles L. Hobson, *Reforming California’s Homicide Law*, 23 PEPP. L. REV. 495, 517-21 (1996).

It should be emphasized, however, that not all commentators fault the court for the holding, even when they criticize the California jurisprudence. Cf. Suzanne E. Mounts, *Premeditation and Deliberation in California: Returning to a Distinction without a Difference*, 36 U.S.F. L. REV. 261 (2002) (arguing that the difficulty traces to the term premeditation itself and that the court had to reach its holding because of this term). Whether there is enough blame, to divide it between the legislature and the court, is the subject of this section of this article.

above suggestions are accurate: the legislation is badly formulated, and the court mishandled the evidence. This approach would conclude that the statute is clumsy, but still, it would have authorized a first-degree murder conviction in *Anderson* if only the court had not mistreated the evidence. Fourth and finally, one can opt for none of the above. One can decide, in other words, that the result in *Anderson* is appropriate.

### **1. Did the *Anderson* Court Fail to Evaluate the Evidence Properly? (Did Bad Judicial Reasoning Create the Result?)**

Three justices dissented in *Anderson*. Justice Burke's dissenting opinion disagreed with the court's evaluation of the evidence. Specifically, Justice Burke would have upheld the inference of a motive of sexual assault against Victoria.<sup>57</sup>

The jury could reasonably infer from the evidence adduced that the underlying motive of the crime was sexual gratification: defendant chose a time when he was alone in the house with the little girl; the window blinds were down and the doors locked; he pursued the child throughout the house inflicting one wound after another; he ripped out the crotch of her panties; he tore her remaining clothes from her; he had removed his own clothes excepting his socks—there was no other logical explanation for the absence of other bloody male clothing and he took a shower immediately after the crime; furthermore, at one time during the assault he had the child on the bed as evidenced by the large bloodstain found in the center of the mattress; and, finally, a number of the wounds inflicted upon the child could be considered sexual in nature, particularly the thrust of the knife into her vagina, the cutting through to the anal canal and the numerous cuts and contusions of her private parts and thighs. . . .

Furthermore, Justice Burke would have found sufficient evidence of premeditation, as he explained in one brief but pointed sentence:<sup>58</sup>

. . . [T]here is credible evidence from which the jury could find a premeditated homicide, e.g. the locking of the doors (whether before or after the actual killing is a matter of conjecture), the duration of the assault, the pursuit through many rooms with a quantity of blood being left in each room, the extensive stabbings many of which would have sufficed as fatal, the removal of

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<sup>57</sup> *Id.* at 955. This reasoning also would have supported affirmance of the first-degree conviction on another ground, namely, murder in the course of a felonious lewd act upon a child. *See infra* Pt. I(C) of this Article.

<sup>58</sup> *Id.*



the murder weapon from one room and the apparent repeated use of it in other rooms. . . .

This reasoning would have resulted in affirmance of Anderson's conviction.

Perhaps the difficulty in *Anderson*, then, is that the court substituted its own evaluation of the evidence for that of the jury. The jury must decide the defendant's guilt beyond a reasonable doubt, but a different standard applies in appellate courts. An appellate judge must view the evidence in the light most favorable to the prosecution, and then must affirm if any rational trier of fact could have found proof beyond a reasonable doubt.<sup>59</sup> The appellate standard of review is a lenient one, favoring affirmance—so lenient that it may at first blush seem inconsistent with the policy of the criminal law to protect the accused. This apparent paradox disappears, however, when one realizes that otherwise, jurors would become a nullity. The jury would be reduced to the status of a group assembled to make a sort of “advisory verdict,” with the real verdict to be supplied by the appellate court after its re-evaluation of the evidence. In fact, the *Anderson* court recited that it was “[v]iewing the evidence in a light most favorable to the judgment.”<sup>60</sup> A possible criticism of *Anderson* is that after articulating this standard, the California Supreme Court simply lost its way and did not follow it.

Perhaps this arguable lack of deference to the jury was aggravated by the court's creation of the *Anderson* factors—the three factors of “planning activity,” “motive,” and “a particular and exacting” manner of killing—factors that depart significantly from the statutory language, which instead requires premeditation and deliberation. As Justice Hugo Black famously observed, “one of the most effective ways of diluting or expanding a [legal principle] is to substitute for the crucial word or words . . . another word or words, more or less flexible and more or less

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<sup>59</sup> See *infra* note 60 and accompanying text.

<sup>60</sup> 447 P.2d at 947.

restricted in meaning.” In this manner, he explained, a “broad, abstract and ambiguous concept” can “easily be shrunken in meaning,” or it can also, on the other hand, be interpreted to govern issues that it never was intended to.<sup>61</sup> Thus, when the court transformed the statutory language into three factors of its own independent creation and made “‘planning’ activity” assume talismanic importance, it arguably did not “clarify” the legislative intent so much as it distorted it. A defender of the opinion can argue, contrariwise, that the three factors are related to premeditation, particularly “planning”; to this, the reader who sees an inappropriate redefinition of the standard in the *Anderson* opinion can only say, yes, but these three narrow factors are not all that can prove the state of mind encompassed in the idea of “premeditation”—and the dissent did a better job, because it recognized this point.

For one thing, one can argue that the idea of “‘planning’ activity” is an oxymoron. “Planning” is a mental function, whereas planning “activity” suggests the requirement of a physical manifestation, something as concrete as a written diagram designed to facilitate an assassination. The court could, instead, have defined premeditation in the sense of a clearly evidenced design to kill (which could readily have been inferred in *Anderson*).<sup>62</sup> Or, the reference to planning “activity” might be read as calling for some type of circumstantial evidence of planning, in the crime or in events before or after it, without focusing solely on the need for specific “actions” that were themselves part of conduct that constituted “planning.” For example, this conception might include evidence that the crime required a long duration of sustained activity. What the court did, instead, however, was to reshape the issue into a requirement of “planning activity”: a rule depending on physically manifested evidence that the

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<sup>61</sup> *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (dissenting opinion).

<sup>62</sup> The court elsewhere noted that premeditation and deliberation carry their “ordinary dictionary meanings.” 447 P.2d at 948.

defendant undertook “activity,” distinctly preceding the crime itself. Thus, the majority was able to deny the existence of premeditation by finding no evidence of planning in “defendant’s *actions prior* to the killing.”<sup>63</sup> By avoiding the trap into which the majority fell, relying as it did so heavily upon convoluted phrases such as “planning *activity*,” Justice Burke was able to find premeditation in such factors as “the duration of the assault, the pursuit through many rooms with a quantity of blood being left in each room, the extensive stabbings many of which would have sufficed as fatal, the removal of the murder weapon from one room, and the apparent repeated use of it in other rooms.”<sup>64</sup> This criticism of *Anderson*, then, would conclude that Justice Burke’s reasoning was more faithful to the legislative concept of deliberation and premeditation than the elaborate structure of factors that the majority created from inferences outside the statute.

This theory—that the flaw in *Anderson* is the court’s evaluation of the evidence—is reinforced by comparison of the *Anderson* opinion to those of other courts. For example, *Commonwealth v. Carroll*<sup>65</sup> is a decision of the Pennsylvania Supreme Court from about the same time as *Anderson*, and it resulted in the affirmance of a first-degree murder conviction with considerably less evidence of premeditation and deliberation than *Anderson* arguably presents. Carroll shot his wife in the back of the head approximately five minutes after a heated argument. There was significant evidence that “rage,” “desperation,” and “panic” had produced an impulsive homicide, brought about by the defendant’s psychological dependence on his wife and her nastily expressed refusal to support his career.<sup>66</sup> Carroll’s own evidence showed that the killing was an “automatic reflex,” as opposed to “an intentional premeditated type of

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<sup>63</sup> *Id.* at 952.

<sup>64</sup> *Id.* at 955.

<sup>65</sup> 194 A.2d 911 (Pa. 1963).

homicide.”<sup>67</sup> The court observed, however, that premeditation could arise instantaneously. “Whether the intention to kill and the killing, that is, the premeditation and the fatal act, were within a brief space of time or a long space of time is immaterial if the killing was in fact intentional, willful, deliberate, and premeditated.”<sup>68</sup> The court’s conclusion: “There is no doubt that this was a willful, deliberate and premeditated murder.” One can easily argue that *Carroll* and *Anderson* are backward, with *Anderson* falling into a more blameworthy category of homicide while *Carroll* presents a lesser, although still serious, kind of offense—especially since the court described Carroll as “terribly provoked” by his “belligerent and sadistic wife” at the time of the killing.<sup>69</sup> This consideration alone does not prove that the *Anderson* court was wrong, of course; one can argue that the statute forced the court to do what it did, and that *Carroll* is the decision that is wrong. *Carroll* does, however, point out a different pathway.

One also can argue that the *Anderson* court made several errors in logic and that they cumulated so as to lead the court away from the legislative standard. In this view, the court created evidentiary standards (the three factors) that did not correspond very closely to the statute. It also improperly ignored other relevant concerns, such as the brutality and violence of the killing, its duration, the multiple repetitions of the killing force, the nature of the wounds, the many physical locations of the crime (in different rooms), the lethal nature of the implement, and Anderson’s multiple cover-ups.<sup>70</sup> Arguably, too, the court gave insufficient deference to the

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<sup>66</sup> *Id.* at 534-35.

<sup>67</sup> *Id.* at 534-35.

<sup>68</sup> *Id.* at 533.

<sup>69</sup> *Id.* at 536.

<sup>70</sup> The court refused to consider Anderson’s repeated lies and destruction of evidence as factors supporting any inference of premeditation, holding that only his “actions prior to the killing” were relevant. Similarly, Professor Lafave refers to cover-up evidence as “obviously not relevant,” citing *Anderson*. LAFAVE 770 & n.32.

This reasoning is erroneous. Evidence of post-crime events may not be alone sufficient to support conviction, but there can be little question that it is “relevant,” at the very least, to the actor’s earlier mental state. Thus, there is a mass of cases holding that post-crime flight or evidence destruction, while not sufficient to prove an earlier crime, is

jury's verdict, when its duty was to view the evidence in the light most favorable to the verdict. Finally, the court adopted reasoning that was unduly cramped when it denied the existence of "any evidence" from which the jury could reasonably have inferred a sexual attack.

This is the blame-it-on-the-court argument. The trouble is, as we shall see next, the legislature's act in adopting the Pennsylvania pattern was the factor that precipitated the court's strange decision.

## **2. The Alternative Theory, That the Statutory Definition of First-Degree Murder Is Flawed: Is *Anderson* the Legislature's Fault?**

There is another way to look at *Anderson*, one that is more favorable toward the court. The legislature had defined first-degree murder, and the court faced the difficult job of applying the muddled Pennsylvania standard. One might think that an intentional killing would qualify as deliberate and premeditated, but the statutory scheme seemed to indicate that intent, by itself, was sufficient only for murder, not for first-degree murder.<sup>71</sup> Premeditation and deliberation must mean something more, or so the argument would go. Furthermore, the three *Anderson* factors had appeared in earlier cases, even if they had not reflected the rigid formula *Anderson* seemed to infer from them.<sup>72</sup> Thus, the court in *Anderson* might be viewed as having attempted to make sense out of vague statutory language by using earlier interpretations, which is a proper function of the judiciary. In fact, the court forthrightly acknowledged that there were "imperfections" and a "lack of conceptual consistency" in the Pennsylvania pattern but correctly

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admissible to supply some evidence of it. See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 162-63 (3d ed. 2003) ("courts generally admit evidence of behavior indicating consciousness of guilt" to prove a "guilty mind.") For a more persuasive treatment of post-crime evidence, see *Hernandez v. State*, 50 P.3d 1100, 1113 (Nev. 2002) ("... even if the knife was thrust into Donna's vagina after her death, it is relevant evidence of [defendant's] state of mind before her death as he beat her, stabbed her repeatedly, and strangled her"). The *Anderson* court should have considered the post-crime evidence in the same way.

<sup>71</sup> See *supra* note 50 and accompanying text.

<sup>72</sup> The *Anderson* court discussed the prior decisions at 447 P.2d at 949-952. For two excellent critiques of the statute, see Charles L. Hobson, *supra* note 56, at 517-21, and Suzanne E. Mounts, *supra* note 56.

recognized a duty to “make practical application” of the law. Furthermore, these cases and other authorities had repeatedly called upon the legislature to fix problems that were obvious from the early days. So, what else was the court to do, in *Anderson*?<sup>73</sup> A critic of the opinion could readily conclude that this theory is not entirely persuasive, because the logic of the *Anderson* opinion arguably remains flawed in several respects; these considerations do, however, raise the question whether the problem with *Anderson* lies in the statutory language, rather than in the court’s interpretation of it.

And there does indeed seem to be reason to fault the Pennsylvania pattern itself. Specifically, defining first degree murder in a way that depends exclusively on premeditation and deliberation raises two kinds of criticisms. First, the premeditation-deliberation formula dissolves into meaninglessness in some kinds of cases. This is why the California court in *Anderson* referred to the legislation as creating jury “discretion” to find either first- or second-degree murder. Second, by choosing mens rea as the sole determinant of the most serious grade of murder, and a peculiarly defined mens rea at that, the legislation creates an artificial standard that prevents crime grading from correlating with offense severity.

(a) *Vagueness in the Premeditation-Deliberation Formula.* At first blush, the concept of “premeditation” does not seem excessively vague. But when it is combined with the concept that premeditation can arise in an extremely brief time period, or in other words virtually at the instant of the crime,<sup>74</sup> the standard that it seems to impose disappears. “Premeditation” that appears “instantaneously” is an oxymoron.<sup>75</sup> The California court in *Anderson* seemed tacitly to

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<sup>73</sup> *Id.* at 948. For early vigorous criticism, see Pike, *What Is Second-Degree Murder in California?*, 9 S. Cal. L. Rev. 112 (1936).

<sup>74</sup> *E.g.*, *People v. Donnelly*, 190 Cal. 57, 2109 P. 523 (1922) (holding that premeditation does not require any appreciable time lapses between the intention to kill and the act of killing, but instead, that they may be as “instantaneous” as successive thought of the mind).

<sup>75</sup> See LAFAVE § 14.7(a) for a discussion of the time issue.

recognize this problem by its insistence on the importance of “planning activity,” or actual *activity* that occurs demonstrably beforehand. But *Anderson* leaves open the possibility that premeditation can arise without prior planning activity.

The law must be conveyed to the jury, and the kind of confusion inherent in the coupling of “premeditation” with an impulse arising instantaneously then will manifest itself in jury instructions that do not guide the jury. Empirical studies tend to demonstrate that jurors conscientiously attempt to follow the judge’s instructions.<sup>76</sup> Lengthy deliberations in hard cases may well come down to interpretation of words used in the court’s charge.<sup>77</sup> And so, if there is to be an instruction that is internally contradictory in a jury trial, let it not be in the basic definition of the most serious criminal offense that the State has created.

The *Anderson* court avoided recognizing the problem of vagueness by characterizing it, instead, as jury “discretion.”<sup>78</sup> This euphemism papers over the defect, but it hardly solves the problem. Unguided discretion is the opposite of law; it is lawlessness. As Kenneth Culp Davis wrote in his landmark work, *Discretionary Justice*, “The vast quantities of unnecessary discretionary power that have grown up in our system should be cut back, and the discretionary power that is found to be necessary should be properly confined, structured, and checked.”<sup>79</sup> Otherwise, discretion manifests itself in arbitrary results, dissatisfied litigants, and lessened respect for law. But it is particularly in the guidance of decisionmakers that discretion or vagueness is a disadvantage. In a series of decisions, the United States Supreme Court has

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<sup>76</sup> *E.g.*, HARRY A. KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 219, 220-41 & n.31 (1966).

<sup>77</sup> For example, after the Watergate scandal that led to the resignation of President Richard Nixon, a jury found presidential aid Dwight Chapin guilty of perjury, and the foreman explained the jury’s long deliberations by saying, “We spent [most] of our time on semantics. Interpretation of words.” *Houston Chronicle*, April 7, 1974, § A, at 12, col. 2.

<sup>78</sup> *See supra* note 45 and accompanying text.

<sup>79</sup> KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 216 (1969).

explained why.<sup>80</sup> Citizens who attempt to comply with the law need reasonable specifics so they can avoid unintentional commission of crimes. But as the Court has been clear in observing, the more important reason for eliminating vagueness is to guide decisionmakers who must apply the law.<sup>81</sup> Obviously, these decisionmakers include juries. The kind of vagueness inherent in the premeditation concept was not sufficient to create a constitutional violation, and the *Anderson* court cannot be faulted for enforcing it; but the vagueness issue should have prompted the legislature to reconsider the term.

In fact, the *Anderson* court's invocation of "discretion" as an alternate term to vagueness is an indication that the premeditation-deliberation formula is a non-standard. In this regard, the definition of first-degree murder resembles the fallout from the ill-fated treatment of insanity in *Durham v. United States*,<sup>82</sup> which defined insanity as the "product" of a "mental disease or defect." Critics described this definition, too, as a "non-rule,"<sup>83</sup> and undoubtedly it led to jury "discretion" of a sort. The *Durham* test also resulted in blizzard of appellate opinions<sup>84</sup> going in different directions and sometimes featuring abrupt reversals.<sup>85</sup> Finally, even the court that had created the rule abandoned it.<sup>86</sup> During its unhappy existence, the *Durham* rule "traveled a remarkably circuitous path toward the conclusion that the jury needed some guidance, that words

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<sup>80</sup> *E.g.*, *Kolender v. Lawson*, 461 U.S. 352, 357 ( ) (citing other cases).

<sup>81</sup> The "more important aspect" of vagueness doctrine is to avoid statutes with "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.*, citing *Smith v. Goguen*, 415 U.S. 566 575 (1974).

<sup>82</sup> 214 F.2d 862 (D.C. Cir. 1954).

<sup>83</sup> See LAFAVE at 394, citing ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* 84 (1967).

<sup>84</sup> "In the decade following *Durham*, over one hundred appellate opinions involving the sanity issue were decided by the" D.C. court. LAFAVE 395.

<sup>85</sup> See, e.g., *Blocker v. United States*, 274 F.2d 572 D.C. Cir. 1959); *Blocker v. United States*, 288 F.2d 853 (D.C. Cir. 1961) (refusing initially, on the basis of expert testimony, to recognize "antisocial personality disorder" as a mental disease or defect giving rise to the insanity defense but then ordering new trial based on different testimony in another case by another expert).

<sup>86</sup> *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).



like ‘mental disease’ and ‘product’ were inadequate, and that the standard would have to incorporate somehow a description of the sorts of effects . . . that were relevant to compliance with the criminal law.”<sup>87</sup> Even today, as Professor LaFave puts it, “[t]he eighteen years of experience with *Durham* remain instructive on the fundamental question of how the insanity defense should be defined”<sup>88</sup>—and, one might add, how all substantive criminal law doctrines ought to be defined, including laws against murder.

When the *Durham* court overruled its own rule in *United States v. Brawner*,<sup>89</sup> it emphasized the importance of “uniformity.”<sup>90</sup> In addition, it considered the effect of jury “discretion” and determined that, instead of discretion concealed in indeterminate language, jurors needed and deserved more specific guidance in the form of legal rules:<sup>91</sup>

. . . If the law provides no standard, members of the jury are placed in the difficult position of having to find a [person] responsible for no other reason than their personal feeling about [that individual]. . . . It is far easier for them to perform the role assigned to them by legislature and courts if they know . . . that their verdicts are "required" by law. . . .

There may be a tug of appeal in the suggestion that law is a means to justice and the jury is an appropriate tribunal to ascertain justice. [But] [t]his is a simplistic syllogism. . . . The thrust of a rule that in essence invites the jury to ponder the evidence . . . , and then do what to them seems just, is to focus on what seems "just" as to the particular individual. . . .

The court explained further, as follows:<sup>92</sup>

Still another aspect of justice is the requirement for rules of conduct that establish reasonable generality, neutrality and constancy. . . . It is the sense of justice propounded by those charged with making and declaring the law—legislatures and courts—that lays down the rule . . . . It is one thing . . . to tolerate

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<sup>87</sup> LAFAVE 395, quoting ABRAHAM S. GOLDSTEIN, *supra* note 83, at 86.

<sup>88</sup> LAFAVE 395.

<sup>89</sup> 471 F.2d 969 (D.C. Cir. 1972).

<sup>90</sup> *Id.* at 984.

<sup>91</sup> *Id.* at 988, quoting ABRAHAM S. GOLDSTEIN, *supra* note 83, at 81-82.

<sup>92</sup> 471 F.2d at 988-89.

and even welcome the jury's sense of equity as a force that affects its application . . . the legal rules that crystallize the requirements of justice as determined by the lawmakers of the community. It is quite another to set the jury at large, without such crystallization, to evolve its own legal rules and standards of justice. . . .

This “instructive experience,” as Professor LaFave describes it, should lead to extreme skepticism about the viability of jury “discretion” of the kind that the *Anderson* court uncritically accepted, or that the Pennsylvania pattern makes inevitable.

The non-standard contained in the premeditation-deliberation formula raises other disadvantageous possibilities. Jurors may feel the need to obtain guidance from sources other than the judge’s instructions. For example, the focus of the premeditation-deliberation formula on poorly defined subjective mental states means that mental health experts, particularly psychologists and psychiatrists, may become important witnesses.<sup>93</sup> If these experts address the issue directly, by opining on the question whether the defendant “did” or “did not” premeditate, they may undermine the law-defining function of the court.<sup>94</sup> Even if they testify in terms that do not replicate the ultimate issue, these experts can accomplish the same result by substituting synonyms for premeditation and deliberation. This state of affairs invites the prospect of a cottage industry of partisan witnesses, paid to become advocates and to shove the legal standard, rather than the facts, in one direction or the other. Alternatively, the jury may obtain guidance on the meaning of premeditation from the adversary lawyers who present the case to them. Bad crime definitions and indeterminate jury instructions mean that trial lawyers have more rhetorical influence over jurors.<sup>95</sup> Sometimes the prosecutor and defense lawyer, through balanced use of

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<sup>93</sup> *Cf.* *Commonwealth v. Carroll*, 194 A.2d 911 (Pa. 1963) (observing that role of psychiatrist who testified about premeditation was to persuade the jury).

<sup>94</sup> This concern is illustrated by the insanity cases following *Durham*, which are discussed *supra* in notes 84-91 and accompanying text. In fact, experts at first frequently testified that defendants actions were or were not “products” of “mental diseases or defects,” and they thereby tacitly resolved underlying legal issues. This practice was disapproved in *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967).

<sup>95</sup> See DAVID CRUMP et al., *supra* note 15, at 51.

jury argument, can explain the confusing instructions so that jurors understand them better. But if one attorney is skillful and the other not, an imbalance may result, and thus a confusing jury charge makes outcomes depend significantly on the randomly distributed abilities of lawyers.<sup>96</sup> This undesirable effect is to some degree inevitable, but it should be contained by jury instructions that guide the jury, rather than by the exercise of lawmaking “discretion” by individual jurors.

Finally, there is the ugly prospect that invisible and unguided “discretion” may mean a result based on factors outside the law—or inconsistent with the law. A jury unable to apply the court’s instructions may consider factors that no lawyer would recognize as relevant. A jury that favors or disfavors a particular group or activity may consciously or unconsciously act upon its prejudices.<sup>97</sup> Specific definition of crimes may not eliminate these possibilities, but it probably reduces them, whereas the *Anderson* court’s acceptance of discretion may have increased them.

(b) *Crime Grading That Is Inconsistent With Blameworthiness.* But vagueness is not the only flaw in the Pennsylvania pattern. By focusing so heavily upon the single factor of mens rea, and on one particular formulaic description of mens rea at that, the premeditation requirement for first-degree murder produces poor crime grading. Highly blameworthy crimes may end up being categorized merely as second-degree, while murders that arguably are less blameworthy may come out as first-degree.<sup>98</sup> The *Anderson* case is itself an example. While tacitly admitting that the crime was particularly brutal, the court announced that “the brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation.”<sup>99</sup> In fact, the

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<sup>96</sup> *Id.*

<sup>97</sup> See *supra* note 81 (Supreme Court’s recognition that vagueness enables “police, prosecutors and juries” to follow their “personal predilections” instead of law).

<sup>98</sup> See *infra* notes 65-69 and accompanying text.

<sup>99</sup> See *supra* note 47 and accompanying text.

*Anderson* opinion seems to depreciate the seriousness of violent murders precisely because they happen to be inexcusable, incomprehensible, and brutal. The court made it clear that a “random,” “violent,” and “indiscriminate” murder would not qualify as deliberate or premeditated.<sup>100</sup> In the topsy-turvy world of the Pennsylvania pattern, a defendant may be rewarded by reduction in the grade of the offense if the defendant committed it in a thoughtless, senseless, frenzied, and bizarre manner.

This issue is not new. The great legal historian James Fitzjames Stephen described the arbitrariness produced by a premeditation standard in his landmark *History of the Common Law of England*.<sup>101</sup>

As much cruelty, as much indifference to the life of others, a disposition at least as dangerous to society, probably even more dangerous, is shown by sudden as by premeditated murder . . . [Imagine that a man], passing along the road, sees a boy sitting on a bridge over a deep river and, out of mere wanton barbarity, pushes him into it and drowns him. A man makes advances to a girl who repels him. He deliberately but instantly cuts her throat . . . In none of these cases is there premeditation unless the word is used in a sense as unnatural as “aforethought” in “malice aforethought,” but each represents even more diabolical cruelty and ferocity than that which is involved in murders premeditated in the natural sense of the word.

In other words, the premeditation-deliberation formula distorts crime grading by treating very serious murders as less serious. The opposite also is true, because the premeditation-deliberation formula treats less blameworthy crimes more seriously than more blameworthy ones. “One form of premeditated killing, mercy killing, society may not view as particularly ‘blameworthy’.”<sup>102</sup> Nevertheless, the Pennsylvania Pattern lumps these less blameworthy offenses together with the

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<sup>100</sup> See *supra* note 48 and accompanying text. The court has retreated somewhat from this position to observe that a “random” and “senseless” crime can still be premeditated. See *infra* note 142 and accompanying text.

<sup>101</sup> JAMES F. STEPHEN, *HISTORY OF THE COMMON LAW OF ENGLAND* 94 (1883).

<sup>102</sup> Sean J. Kealy, *Hunting the Dragon: Reforming the Massachusetts Murder Statute*, 10 B.U. PUB. INT. L.J. 203, 249 (2001). For an example, see *State v. Forrest*, 362 S.E.2d 252 (N.C. 1987) (mercy killing of ailing father by son).

most serious crime in the Penal Code.

States that still use the Pennsylvania pattern should listen to Judge Stephen's time-honored advice. Not only is the premeditation-deliberation formula vague; to the extent that it embodies a standard at all, it creates results that are inconsistent with the policy of grading homicides to reflect their relative blameworthiness. At its worst, it invites juries to act lawlessly in voting their prejudices. There are better ways of defining murder, ways that this Article will consider below.

### **3. The Third Theory: Both the Legislation and the *Anderson* Opinion Are Flawed**

The third possibility is that the legislation and the *Anderson* opinion are both misconceived. In this view, the statute defines first-degree murder poorly by using the premeditation-deliberation formula, but the California court could better have upheld Anderson's conviction by using a different interpretive approach, such as that of the dissent. As this article has already noted, the Pennsylvania pattern has persisted for a long time, and as the article will demonstrate later, the scholars who drafted the Model Penal Code squarely rejected it. As for the *Anderson* opinion, the current interpretive regime, which this article will explore below, is far more deferential in upholding jury verdicts. Today's decisions probably would lend to an affirmance of Anderson's conviction, and although the current court has refrained from overruling *Anderson*, it has pointedly expanded the kinds of evidence that can suffice for premeditation and avoided the rigidity with which the earlier court seemed to apply its three factors.

This conclusion, it is submitted, is probably the most persuasive of the four possibilities. The court in *Anderson* lost its way. But perhaps more importantly, the legislature can (and should) revise the statute, perhaps in ways more reflective of the Model Penal Code. This article

will return to this question in its conclusion.

#### **4. Defending the Premeditation-Deliberation Formula and the *Anderson* Reasoning**

In defense of the premeditation-deliberation formula, it can be said that this formulation is traditional. It has been applied in the majority of American jurisdictions.<sup>103</sup> For several reasons, however, the pedigree of the premeditation-deliberation formula is not a persuasive reason for retaining it. In the first place, it does not trace to the common law; the English judges never divided murder into degrees. That development is the result of legislation, which should be subject to change, just as all legislation is subject to change.<sup>104</sup> Furthermore, the reasoning underlying the premeditation-deliberation formula was to limit more severe punishments, usually including the death penalty, to the most blameworthy crimes.<sup>105</sup> Today, the death penalty is limited primarily by other factors.<sup>106</sup> For determining the lengths of prison sentences, the premeditation-deliberation formula simply is too inaccurate to separate the most serious murders from less serious ones, both because of its vagueness and because of its dependence upon a single characteristic in a complex world that depends also on many other factors.<sup>107</sup>

Changing a rule as ingrained as the premeditation-deliberation formula will not be without institutional costs. There probably will be significant errors as legislation and adjudication struggle over many years to process a new definition through all of its

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<sup>103</sup> See LAFAVE 766.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 175-76.

<sup>107</sup> *Cf.* Kealy, *supra* note 101, at 249-51 (giving examples of ways in which premeditation and deliberation could be replaced by other characteristics). This Article proposes a different solution: a single degree of murder with sentencing which may be structured by guidelines that treat those characteristics, among others. See Pt. D of this Article, below.

consequences.<sup>108</sup> But if this kind of shakeup of the system were sufficient to preclude reasoned change, physicians in California would cure infections today by bleeding patients rather than using antibiotics. Tradition is not a sound reason for keeping the Pennsylvania pattern, and neither is the cost of change.

Another defense of the premeditation-deliberation formula might be founded on the argument that mens rea assertedly is the most reliable indicator (or to some, perhaps, the only indicator) of blameworthiness.<sup>109</sup> This argument has been offered in other areas, particularly in opposition to the felony-murder rule<sup>110</sup> and to victim impact evidence.<sup>111</sup> Opponents of these doctrines often advance their concepts of blameworthiness as a reason for eliminating all other considerations than mens rea.<sup>112</sup> The argument is unpersuasive for several reasons. In the first place, the premeditation-deliberation formula does not focus on the range of blameworthy mental states; it focuses only on one vague but narrowly defined mental state. To the extent that it has meaning, it produces the dubious result of preferring senseless, brutal, and bizarre murders for lenient treatment, precisely because they are senseless, brutal, and bizarre.<sup>113</sup> This is a strange approach to blameworthiness.

Furthermore, an exclusive focus upon mens rea is a dubious way to distinguish or grade blameworthiness. Components of the actus reus, including the act itself, the circumstances, and the result, also figure into the calculus of blameworthiness. They always have, from the early

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<sup>108</sup> Cf. *supra* note 13 and accompanying text (giving examples of one State's experience).

<sup>109</sup> Cf. e.g., Commentary to Model Penal Code § 210.2 (Official Draft & Revised Comments 1980) (equating mens rea and state of mind with culpability and blameworthiness; using this argument as justification for rejecting the felony murder rule).

<sup>110</sup> *Id.*

<sup>111</sup> See *Booth v. Maryland*, 482 U.S. 497 (1987) (holding victim impact evidence unconstitutional in capital cases on the theory that it allegedly is "irrelevant" to "blameworthiness"); *South Carolina v. Gathers*, 490 U.S. 805 (1989) (same); *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991) (discussed *infra* in note 117 and accompanying text).

<sup>112</sup> See *supra* notes 109-111.

days of the common law. The debate over the felony-murder rule and over the admissibility of victim impact evidence proves this point. Although attacks on the felony-murder rule usually include conclusionary statements that the rule separates guilt from blameworthiness by eliminating intent requirements,<sup>114</sup> advocates of this argument do not explain why actus reus is not also an ingredient of blameworthiness. Nearly all jurisdictions have retained the felony-murder rule, and close examination shows that a sole focus upon mens rea does not produce results congruent with grades of blameworthiness.<sup>115</sup>

Differences in result must be taken into account as part of actus reus if classification and grading are to be rational. For example, murder and attempted murder may require similar mental states (indeed, attempted murder generally requires proof of a higher mental element), but no common law jurisdiction treats the two offenses as one, and certainly none treats attempted murder more severely. The only difference justifying this classification is that death results in one offense but not in the other. Similarly, it is a misdemeanor for a person to operate a motor vehicle while impaired by drugs or alcohol, but if this conduct causes the death of a human being, the offense in some jurisdictions is elevated to the status of homicide. Most jurisdictions treat vehicular homicide more severely than the misdemeanor of alcohol-impaired driving, even though the actions and mental states of the defendant may be equivalent or identical.

These classifications are the result of a concern for grading offenses so as to reflect societal notions of proportionality. . . .

The felony murder doctrine serves this goal, just as do the distinctions inherent in the separate offenses of attempted murder and murder, or impaired driving and vehicular homicide. Felony murder reflects a societal judgment that an intentionally committed robbery that causes the death of a human being is qualitatively more serious than an identical robbery that does not. . . .

Another misguided attempt to reduce all crime grading to mens rea has concerned victim impact evidence. The Supreme Court initially outlawed this kind of evidence in capital cases, reasoning

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<sup>113</sup> See *supra* notes 98-101 and accompanying text.

<sup>114</sup> See *supra* notes 109-10 and accompanying text.

<sup>115</sup> David Crump and Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, § I(A) (1985).



that the defendant's intent was the only legitimate component of blameworthiness.<sup>116</sup> Ultimately, however, the court reversed itself and held that circumstances and results, as well as intent, were proper ingredients in the grading of a crime.<sup>117</sup>

... [T]he assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment. Thus, two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm. "If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater."

Similarly, the actus reus components of act, circumstances, and result, rather than a focus only on one type of mens rea, should be proper considerations in grading the severity of murders. More to the point, the fact that a murder is particularly brutal, inexcusable, and bizarre should be a factor in aggravation, not in mitigation. Thus, the argument for basing the definition of first-degree murder exclusively on mens rea divorced from context, in the manner of the premeditation-deliberation formula under the Pennsylvania pattern, is ultimately unpersuasive.

### **C. Beyond People v. Anderson: The Perez and Combs Cases**

#### **1. Modifications after *Anderson*: Are There Any? If So, What?**

*Anderson* is not the end of it, of course. There have been more recent decisions. Those decisions suggest that the California court has modified *Anderson*, but the problem is, they do not tell the reader how much of *Anderson* is left, nor do they articulate any new standard.<sup>118</sup> A

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<sup>116</sup> See *supra* note 111.

<sup>117</sup> *Payne v. Tennessee*, 501 U.S. 808 (1991).

<sup>118</sup> See generally Suzanne Mount, *Premeditation and Deliberation in California: Returning to a Distinction without a Difference*, 36 U.S.F. L. REV. 261 (2002) (arguing that the recent cases blur the meaning of first-degree murder). Other useful articles, discussing *Anderson* and its later treatments, include Bruce Ledwitz, *Mr. Carroll's Mental State Or What Is Meant by Intent*, 38 AM. CRIM. L. REV. 71 (2001); Matthew A. Pauley, *Murder by Premeditation*, 36 AM. CRIM. L. REV. 145 (1999); Sean J. Kealy, *Hunting the Dragon: Reforming the Massachusetts Murder Statute*, 10 B.U. PUB. INT. L.J. 203 (2001); Shiva Shirazi Davgudian, *California Homicide Law: The Basics*, 36 LOY. L.A. L. REV. 1375 (2003); Julie Engels, *Mens Rea: Purpose to Kill Offenses*, 36 LOY. L.A. L. REV. 1401 (2003); Tom Stacy, *Changing Paradigms in the Law of Homicide*, 62 OHIO ST. L.J. 107 (2001).

possible reading of the decisions is that *Anderson* has been overruled *sub silentio*, but since the decisions continue to rely on *Anderson* with ostensible approval and some of them use its factors as though they were determinative,<sup>119</sup> the law in California is unclear. And if *Anderson* is indeed gone, it is arguable that there is nothing to take its place. It also is possible, as some commentators have suggested, that the *Anderson* factors are now merely nonbinding guidelines and that premeditation and deliberation are to be read in their ordinary senses, or as symbols for little more than the requirement of a “purposeful” killing. In other words, they mean no more than “intent,” in spite of the resulting effect on the distinction between first- and second-degree murder.<sup>120</sup> If this is so, it arguably makes little difference to retain the *Anderson* factors.

*People v. Perez* is a typical post-*Anderson* decision.<sup>121</sup> It bears a striking resemblance to *Anderson* factually, but the result is different, because the *Perez* court upheld the defendant’s first-degree murder conviction. The deceased was a pregnant woman who, ironically, had the same name as the victim in *Anderson*: Victoria.<sup>122</sup> The defendant was an acquaintance who killed her with multiple stab wounds inflicted with two weapons, including a steak knife. The steak knife had broken, and there was evidence of blood in the kitchen, including blood in the knife drawer. The defendant had parked his car on the street and entered the house, possibly surreptitiously.<sup>123</sup> The court of appeals, following *Anderson*, reversed the first-degree

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<sup>119</sup> See *infra* notes 127-29 and accompanying text.

<sup>120</sup> See Julie Engels, *supra* note 118. One commentator describes the result as “a distinction without a difference.” Suzanne Mount, *supra* note 118. See generally LEVENSON § 5:12 (discussing meaning of *Anderson* in 2005 as “descriptive” but “not normative,” yet “useful to illustrate . . . that the elements of first-degree murder have or have not been satisfied”). Professor Levenson’s summary is about the best that can be hoped for in light of the decisions.

<sup>121</sup> 831 P.2d 1159 (1992).

<sup>122</sup> *Id.* at 1160.

<sup>123</sup> *Id.* at 1164.

conviction.<sup>124</sup> The California Supreme Court reversed the reversal and reinstated the judgment.

One might think that, to reach this result, the court would have to overrule *Anderson*. Unfortunately, it did not. Instead, it read *Anderson* more narrowly than its reasoning would seem to justify. Specifically, the court's interpretation of *Anderson* was that the three factors were neither required nor exclusive. This reading enabled the court to accuse the court of appeals of assuming the role of the jury, even though that is exactly what the *Anderson* court had effectively done,<sup>125</sup> and what it arguably had mandated lower courts to do.<sup>126</sup>

In identifying categories of evidence bearing on premeditation and deliberation, *Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation. . . . [I]t was attempting to do no more than catalog common factors that had occurred in prior cases. The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive.

Given this reasoning, one might have expected the *Perez* court to articulate a new approach, one that would treat the *Anderson* factors neither as a “sine qua non” nor as “exclusive.” One might have expected, in other words, a review of the evidence that did not concentrate on the three *Anderson* factors and that considered other kinds of evidence; in fact, one might have anticipated a new standard. But what the court did, after saying that the three factors were neither exclusive nor necessary, was to use those very three factors as if they were exclusive and necessary.<sup>127</sup>

Evidence of *planning activity* is shown by the fact that defendant did not park his car in the victim's driveway, he surreptitiously entered the house, and he obtained a knife from the kitchen. As to *motive*, . . . it is reasonable to infer that defendant determined it was necessary to kill Victoria to prevent her from identifying him. . . . The manner of killing is also indicative of premeditation and

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<sup>124</sup> *Id.* at 1163. The California Supreme Court alleged that the court of appeals had “substituted its judgment for that of the jury,” but after *Anderson*, which mandated the analysis used by the court of appeals, this criticism was unfair. *Id.*

<sup>125</sup> *See supra* note 124.

<sup>126</sup> 831 P.2d at 1163.

<sup>127</sup> *Id.* at 1164 (citations omitted) (emphasis added).

deliberation. The evidence of blood in the kitchen knife drawer supports an inference that defendant went to the kitchen in search of another knife after the steak knife broke. This action bears similarity to reloading a gun . . . .

And so, is *Anderson* good law after *Perez*? Yes and no. Does *Perez* inaugurate a new approach?

Yes and no. If it does create a new standard, what is it? No one can know from the opinion.

The California court has continued this muddled approach in later decisions. In *People v. Combs*,<sup>128</sup> for example, the court again cited *Anderson* in reviewing a judgment of first-degree murder. Its first step was to recite the three *Anderson* factors. It then observed that the factors were neither necessary nor exclusive. But after doing so, the court again concentrated on the *Anderson* factors as though they were necessary and exclusive, using them as the organizing principle around which it reviewed all of the evidence.<sup>129</sup> The facts in *Combs* were, as the court stated, overwhelmingly supportive of the jury's premeditation-deliberation finding, and maybe the court cannot be faulted for failing to reach beyond the three factors to explain its affirmance. *Combs* demonstrates, however, that the *Anderson* factors still tend to control outcomes even if they have been watered down as requirements, and that there is no other identifiable standard for measuring premeditation and deliberation.

## **2. Possible Interpretations of the Premeditation-Deliberation Formula Today**

One possible way to read these decisions is to conclude that *Anderson* has been overruled. That interpretation depends upon broad inferences, however, and those inferences are weakened by the California court's repeated citation of the decision with apparent approval.<sup>130</sup> The theory that *Anderson* is gone is also undermined by the court's later reliance on the

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<sup>128</sup> 101 P.3d 1007 (Cal. 2004).

<sup>129</sup> *Id.* at 1026, 1027.

<sup>130</sup> See *supra* notes 127-29 and accompanying text.

*Anderson* factors as ostensibly necessary and exclusive, even though the court denies that they are. The *Perez* court went out of its way to harmonize its holding with *Anderson* by asserting, against the apparent tenor of the earlier decision, that *Anderson* did not make the three factors controlling, but merely mentioned them because they were shown by parts of the evidence in earlier decisions.<sup>131</sup>

If *Anderson* has been overruled, furthermore, it is difficult to say what has taken its place. It may be that the court means to return to the general statutory language of premeditation and deliberation and to weigh the evidence against those terms directly. This interpretation would uphold jury findings in a way that would seem more in keeping with the legislative intent than the manner of review inaugurated by *Anderson*.<sup>132</sup> Evidence that *Anderson* summarily and dubiously rejected could then become relevant, such as the violence of the crime, repetition of the method of killing, duration of the offense, physical breadth of locations in which it takes place, or efforts at concealment afterward.<sup>133</sup> Specifically, unusual violence may provide evidence of effort, which may help to develop the planning factor. Repetition may indicate conscious choice, as in the examples of reloading a gun or replacing a broken knife. Duration of the offense is indicative of sustained effort over a period of time, making a deliberate plan to kill evident at some point, and arguably, so is pursuit of the effort to kill through multiple places such as the many bloody rooms in *Anderson*. Concealment efforts, although they cannot alone prove planning, may provide at least some evidence of planning, particularly if they are elaborate or if they must have taken prior thought. The trouble is, many of the more recent decisions do

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<sup>131</sup> See *supra* note 126 and accompanying text.

<sup>132</sup> Cf. *supra* notes 60-65 and accompanying text (discussing whether *Anderson* distorted the legislative language by translating it into the three factors).

<sup>133</sup> Cf. *supra* notes 63-64, 70 and accompanying text (critiquing *Anderson*'s rejection of these factors). In support of the relevance of post-crime evidence, see *supra* note 70.

not seem to take this approach of broadening the scope of cognizable evidence, since they rely exclusively upon the three *Anderson* factors.<sup>134</sup>

It is even possible, if push were to come to shove, that the court might announce that all that is meant by premeditation and deliberation is intent: just plain, old intent. Some jurisdictions, in fact, have adopted precisely this approach; they have compressed premeditation and deliberation into the lesser-included concept of intent.<sup>135</sup> This interpretation has the advantages of simplicity, of creating greater congruence between the judicial concept of premeditation and deliberation and that of the jury (since intent is a term for which the common understanding is closer to its judicial interpretation), and, arguably, of better conformity of homicide verdicts to meaningful gradations of blameworthiness. At the same time, however, interpreting premeditation and deliberation as intent, and nothing more, can be opposed on the ground that it fails to give faithful meaning to the text written by the legislature.<sup>136</sup> All three words appear in homicide statutes conforming to the Pennsylvania pattern. In California, “intent” is used as the express term for defining malice aforethought, which is the requirement for all murder, including second degree murder, and first-degree murder is an aggravated form of the

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<sup>134</sup> *Perez* and *Combs* are examples. See *supra* notes 121-29 and accompanying text.

<sup>135</sup> See, e.g., *Greene v. State*, 838 P.2d 54, 61 (Nev. 1997) (holding that “the terms premeditated, deliberate, and willful are a single phrase, meaning simply that the actor intended to commit the act and intended death as the result”).

The Nevada court later decided, however, to “abandon” its “inconsistent” jurisprudence by distinguishing and distinctly defining each term—but it also authorized jury instructions saying that premeditation could be as “instantaneous” as “successive thoughts of the mind.” *Byford v. State*, 994 P.2d 700, 713-15 (Nev. 2000). This “instantaneousness” instruction arguably negates the time-sequence ingredient inherent in “premeditation.” See *supra* notes 74-75 and accompanying text. Later, in fact, the Nevada court reinterpreted *Byford* as “disapprov[ing]” this instruction, which *Byford* actually instead had approved(!), and it seemed to indicate that “instantaneous” premeditation no longer qualified. *Thomas v. State*, 83 P.3d 818, 824 (2004). But then, to complete this odd chain of reversals, the *Thomas* court upheld the conviction in that case with the *non sequitur* that the time sequence did not matter, because the case involved a robbery-murder and “in robbery cases it is immaterial when the intent to steal the property is formed.” *Id.*

<sup>136</sup> See, e.g., *supra*, note 135 and authorities therein cited (discussing decisions that abandoned treatment of intent as sufficient and attempted instead to follow distinct words of statute).

crime.<sup>137</sup> The statutory texts seem to indicate, or at least they leave open the possibility, that an intentional murder could occur without premeditation and deliberation.<sup>138</sup> On the other hand, this interpretation is not unavoidable; it is logically possible to interpret the text of the legislation (if not the judicial decisions) to allow malice to be found from intent or otherwise, but to hold that only first-degree murders exhibit intent.<sup>139</sup> The statutory language dates from a century and a half ago,<sup>140</sup> and it was written under conditions in which it had the very different function of confining capital punishment.<sup>141</sup> Making sense out of first-degree murder under the Pennsylvania pattern may require the court to cut the Gordian knot, with the question being: in what manner are we to reconcile the conflicting possible interpretations?, because of the muddled state of affairs in which the premeditation-deliberation formula is to be found today. If so, following the lead of other jurisdictions and declaring that premeditation and deliberation mean, simply, intent, would have a variety of advantages.

Or, *Anderson* may still be good law. It may be weakened but unbroken. *Perez* may mean that the *Anderson* factors are still predominant, but that a reviewing court is to handle them in a way that defers to the jury more than the *Anderson* court did. As one commentator, Julie Engels, persuasively puts it, the *Anderson* factors have become “guidelines, not rules.” The courts use the factors merely “to aid in the premeditation analysis,” and they do so “more leniently” than *Anderson*’s “strict” restraints would require. This looser approach allows affirmance of a first

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<sup>137</sup> Cal. Penal Code § 187-89 (West 2005).

<sup>138</sup> *Id.* In fact, this aspect of the statute was a major reason for the California court’s reasoning in *Anderson*. See *supra* note 50 and accompanying text.

<sup>139</sup> *Cf. supra* note 135 and accompanying text (discussing cases that have equated intent and premeditation).

<sup>140</sup> *Cf. Keeler v. Superior court*, 470 P.2d 617 (Cal. 1970) (tracing the language of the present California murder statute to 1850).

<sup>141</sup> See LAFAVE 766, § 14.7. But today, capital punishment is confined in a completely different way: by specification of particular, defined circumstances in which it is available. *E.g.*, *Gregg v. Georgia*, 428 U.S. 153 (1976). See also LEVENSON § 5:25 (discussing California’s “special circumstances” statute, which defines liability for capital punishment).

degree conviction without any particular pattern of the three factors; indeed, it may allow affirmance even if none is present. Thus, even “[a] senseless, random, but premeditated killing supports first degree murder.”<sup>142</sup> This interpretation is consistent with the holding in *Perez*, which is the most significant decision interpreting *Anderson*. It would mean a reversal of the result in *Anderson*, and it too would go a long way toward rationalizing the results in first-degree murder cases.

One possible criticism of this approach is that it undermines the requirements of premeditation and deliberation that are controlling under the Pennsylvania pattern. In reality, “intent” may wind up supplying these ingredients. Thus, as Engels also observes, “The result is that premeditation has taken on less and less meaning, becoming more synonymous with a purpose to kill.”<sup>143</sup> This result may not be undesirable, and it arguably is as faithful to the legislative language as *Anderson*’s rigid interpretation.<sup>144</sup> No matter what it does to interpret the premeditation-deliberation formula, a court will encounter a degree of irrationality and inconsistency requiring it to cut the Gordian knot. *Anderson* did so by inventing criteria that do not fit the language. Interpreting premeditation as “purpose” or “intent” is no worse a way to cut the knot, and arguably it is better.

But even if *Anderson* is (or has been) overruled or made more lenient, the problem remains: the premeditation-deliberation formula is still the statutory standard that distinguishes first-degree murder. These terms must be included in the trial court’s instructions to the jury, and usually, they will be defined for the jury. Their ambiguities, inconsistencies, omissions, and

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<sup>142</sup> Julie Engels, *Mens Rea: Purpose to Kill Offenses*, 36 LOY. L.A. L. REV. 1401, 1408-09 (2003). The reference to “senseless, random” killings is quoted from *Perez*, 828 P.2d at 115. See also, *supra* note 120 (describing Professor Levenson’s summary).

<sup>143</sup> *Id.* at 1409.

<sup>144</sup> *Anderson* also distorted the legislation, or at least this conclusion is readily arguable. See *supra* note 61 and accompanying text.



irrational results will lurk in the background to influence the meaning of whatever definition of these terms is given to the jury.

Thus, Pattern Jury Instructions in California, today, include the following explanations:<sup>145</sup>

CALJIC 8.20. Deliberate And Premeditated Murder

. . . The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.

The word "premeditated" means considered beforehand.

If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, [he] [she] decides to and does kill.

These instructions imply by their emphasis that no time is required, or in other words that “instantaneous premeditation” is possible, even though that notion seems internally inconsistent. They do not say so, however, and thus they remain ambiguous. The instructions do not tell the jury that a “senseless, random” murder can be first degree, either, although the California

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<sup>145</sup> Committee on Standard Jury Instructions, California Jury Instructions—Criminal (CALJIC) 8.20 (Oct. 2005).

decisional law says so;<sup>146</sup> instead, they are capable of being understood as excluding first-degree murder for a senseless and random killing. In fact, the *Anderson* court’s reasoning reached exactly this odd conclusion. These pattern instructions do not even include the *Anderson* factors, although a reviewing court is quite likely to use those factors to evaluate the verdict, and thus, the jury is not told about the law that will uphold or reverse what the jury does. Finally, premeditation and deliberation are not comprehensibly distinguished from intent, and the paragraph that ends by authorizing first-degree murder for someone who “decides” to kill makes them appear synonymous with intent. This dizzying array of submerged issues guarantees that the jury will act with a wide range of unguided “discretion,” which is to say, lawlessly.<sup>147</sup> Cases that ought to be first-degree will result in second-degree verdicts, and cases that ought to be second-degree will result in first-degree verdicts, with the distinctions based on nothing more than confusion. Similar cases will result in disparate verdicts. And the jury is free to vote on the basis of extra-legal considerations, including invidious ones, because of the concept of discretion.

Furthermore, imprecision about what has happened to *Anderson* will continue to confuse appellate counsel—and the courts. Appellate lawyers must feel forced to argue insufficiency of the evidence in many first-degree murder cases even if there is evidence galore, if only to avoid later claims that they were ineffective. These sufficiency claims are less likely to have merit after *Perez*; still, because *Anderson* remains, they must be asserted. They necessarily will elbow out full briefing of other appellate issues. And they will consume scarce criminal justice

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<sup>146</sup> See *supra* note 143 and accompanying text. See also LEVENSON § 5:12 (the *Anderson* test itself “does not describe elements of premeditation” and is for appellate review only; it “should not be included in any instructions given to the jury.”) Something is wrong when the definition given the jury is not consistent with the standard for review of the jury’s verdict.

<sup>147</sup> Cf. *supra* notes 45, 78-98 (quoting *Anderson* as approving jury “discretion” but arguing that discretion of this sort is really lawlessness, with numerous disadvantages).

resources wastefully. In fact, a Westlaw search using the terms “premeditation,” “deliberation,” and “People v. Anderson” disclosed 505 appellate cases in California,<sup>148</sup> of which hundreds are unreported, particularly among more recent cases. Unreported cases suggest unmeritorious issues. But the most unfortunate aspect of this problem is that appellate counsel’s endeavor to attack sufficiency on premeditation-deliberation grounds often will not be related to values that matter. If an affirmance or reversal results on this ground, there is no reason to believe that it will correlate with offense severity, since the premeditation-deliberation formula itself does not.<sup>149</sup>

In California, the Pennsylvania pattern thus has created a climate in which millions of dollars’ worth of scarce criminal justice resources are spent on nothing of value, when they could be spent on victim compensation, better policing, improved prison conditions, or for that matter, litigation and appeals of issues that do matter. And this criticism must be applicable, at least to some degree, in every jurisdiction that follows the premeditation-deliberation formula. The disadvantages of the premeditation-deliberation formula—its vagueness and tendency to produce results inconsistent with blameworthiness—are serious.

#### ***D. Situation-Specific First-Degree Murder: “Lying in Wait” and Other Gap-Fillers***

The Pennsylvania pattern in most States does not rely exclusively on premeditation and deliberation to define first-degree murder, although these are the most frequent criteria. First-degree murder in California, for example, also includes murder perpetrated by means of “explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, . . . arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train

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<sup>148</sup> The search focused upon the California state courts and used the following query: PREMEDITATION & DELIBERATION & “PEOPLE V. ANDERSON.”

<sup>149</sup> See *supra* Pt. I(B)(2)(b) of this Article (discussing inconsistency of premeditation-deliberation formula with blameworthiness).

wrecking, or any act punishable under [certain other statutes], or . . . discharging a firearm from a motor vehicle, intentionally at another person with the intent to inflict death.”<sup>150</sup> Some of these criteria (such as lying in wait) are traditional,<sup>151</sup> but most of the statute reads as though the legislature acted episodically in response to the newspaper headlines of the day—covering “train wrecking” murders and armor-piercing bullets as rare examples of recent egregious homicides that otherwise were not covered as first-degree murders—instead of fixing the fundamental problems in the statute.

These specific-instance definitions of first-degree murder raise the same problems of proof, ambiguity, and inconsistency with blameworthiness that are inherent in the premeditation-deliberation formula. “Lying in wait,” for example, seems fairly specific at first blush, but in concrete cases, it can be extraordinarily difficult to apply, and the courts have found it necessary to produce a complex, multi-factor test for the meaning of “lying in wait.”<sup>152</sup> What is more, the phrase means different things in different cases,<sup>153</sup> although the courts easily confuse this point.<sup>154</sup> In fact, Anderson and Perez, in their respective murders, probably “lay in wait,” since this kind of murder in California mainly seems to require a surprise attack, and it “does not require that the victim come to the murderer.” Thus, in California (as opposed to some other jurisdictions), the murderer does not have to “wait” to “lie in wait.”<sup>155</sup> The *Anderson* case shows

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<sup>150</sup> Cal. Penal Code § 189 (West 2005). *See generally* LEVENSON § 5:13-5:28 (discussing these kinds of murder in California). Note that the specification of felonies that can support first-degree murders creates both a first-degree and a second-degree version of the felony-murder rule in California. *See* LEVENSON § 5:17.

<sup>151</sup> *See* LAFAYE 771.

<sup>152</sup> *E.g.*, *People v. Huerta*, 2005 WL 2374856 at III (Cal. App. 3d Dist.) (unreported decision). *See also infra* notes 153-54 and authorities therein cited (discussing other problems raised by “lying in wait”).

<sup>153</sup> *Id.* The jury’s task is made more complicated because in many cases, particularly death penalty cases, both formulations appear. *I.e.*, “lying in wait” is defined in two inconsistent ways. The jury then must apply one lying-in-wait definition to one issue and another definition of the same term to another issue.

<sup>154</sup> *See id.* The court there cited both definitions but did not indicate which it was applying.

<sup>155</sup> *Id.*, *citing* *People v. Gurule*, 28 Cal.4<sup>th</sup> 557, 631 (2002). In *Gurule*, the defendant surprised the victim after engaging him in conversation. This circumstance sufficed to supply the lying-in-wait ingredient. By this standard,

another kind of ambiguity by raising the issue whether Anderson killed while committing the felony of lewd acts upon a child in violation of California Penal Code § 288.<sup>156</sup> This circumstance also suffices to elevate the murder to first degree.<sup>157</sup> The *Anderson* majority held the evidence insufficient to raise “any” inference of a sexual motive,<sup>158</sup> prompting the question whether there could ever be such a case, given the powerful evidence there of precisely that motive. The dissent briefly but persuasively details the argument to the contrary.<sup>159</sup>

These specific-means definitions of first-degree murder exhibit the flaw of disparity just as the premeditation-deliberation formula does: a disconnect from blameworthiness. Given that the essential factor for “lying in wait” in California seems to be surprise,<sup>160</sup> and given that many if not most murder victims presumably are surprised by their killers’ use of deadly force, it is easy to see how inconsistent outcomes can result. A person subjected to surprise automatically becomes the victim of a first-degree murder, provided, that is, that the jury exercises its “discretion” accordingly; but if the victim expects to be killed and is not surprised, this kind of special-means murder does not apply, and the killing may be reduced to a lesser degree, even though there is no basis in proportional crime grading for this difference. In fact, the whole idea of separately defining lying-in-wait murders would seem unnecessary if only the words of the statute meant what they said, because it would appear that a killer who lies in wait, intending to

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both *Anderson* and *Perez* would allow inferences of lying in wait, and a premeditation analysis would become unnecessary. In fact, the reasoning in *Gurule* would appear to support first-degree murder in any case except one in which the victim approached the killer while knowing of the killer’s plan to kill that very victim. *See also* LEVENSON § 5:15 (discussing complexities of “lying in wait”).

But some jurisdictions require a “watching and waiting in a concealed position.” *See* LAFAYE 771, citing *United States v. Shaw*, 701 F.2d 367 (5<sup>th</sup> Cir. 1983).

<sup>156</sup> Cal. Penal Code § 288 (West 2005).

<sup>157</sup> Cal. Penal Code § 189 (West 2005) (defining as first-degree murder any killing perpetrated in the commission of a crime under § 288).

<sup>158</sup> 447 P.2d at 954-55.

<sup>159</sup> *See supra* note 57 and accompanying text.

<sup>160</sup> *See supra* note 155 and accompanying text.

commit murder, acts with premeditation and deliberation anyway.

In the end, these specific-means definitions of first degree murder probably plug a few loopholes, but they do so at the expense of creating new ambiguities, inconsistencies, and disparities. They serve mainly to demonstrate the inadequacy of the Pennsylvania pattern. Isn't there a better way?

### ***E. The Model Penal Code Approach: One Degree of Murder***

#### **1. A Single Degree of Murder, Committed in One of Three Ways**

My State, Texas, differs sharply from the Pennsylvania pattern (and from California) in its definition of murder. At one time, Texas did have two degrees of murder,<sup>161</sup> but our legislature was persuaded by the drafters of the Model Penal Code<sup>162</sup> to adopt a single degree. The offense can be committed in any one of three ways:<sup>163</sup>

first, by “. . . *intentionally or knowingly*” causing the death of an individual.

This type of murder in Texas is a verbatim adoption of the Model Penal Code formula, except that the word “intentionally” is substituted for the word “purposefully” in the MPC. “Intentionally” is defined precisely, following the MPC, and so is “knowingly.”

second, by “. . . *intending to cause serious bodily injury*” while committing “an act clearly dangerous to human life” that causes the death of an individual.

This Texas definition of murder resembles common law murder based on a serious assault, except that it goes beyond requiring the mental state of intent to commit the assault by adding an objective actus reus component: an “act clearly dangerous to human life.” This component confines the application of this provision.

third, *by committing a defined version of felony murder*. This kind of murder also differs sharply in Texas from other definitions, which is discussed and critiqued in a later section of this article.

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<sup>161</sup> The two degrees were “murder with malice” and (counterintuitively) “murder *without* malice” (emphasis added). See generally *Mims v. State*, 3 S.W.3d 923, 925-26 (Tex. Crim. 1999) (detailing the statutory history and citing the statute as Tex. Penal Code art. 1257 (1931)).

<sup>162</sup> American Law Institute, Model Penal Code § 210.1 (1962).

<sup>163</sup> Tex. Penal Code § 19.02 (b) (Vernon 2005) (emphasis added).

Jurors in Texas thus are not given confusing, internally inconsistent instructions. In the simplest kinds of cases, they are required to decide, beyond a reasonable doubt, whether the killing was “intentionally” or “knowingly” committed.<sup>164</sup>

This inquiry, under the Model Penal Code, is clear and relatively unambiguous, and it probably can be applied by jurors with a facility close to that of judges. A definition of “intent” and of “knowledge” is provided.<sup>165</sup> In close cases, these definitions probably are helpful, but the key advantage of the terminology is that the technical definitions do not vary sharply from the ordinary understanding.<sup>166</sup> The use of a single degree of murder avoids reliance on any one particular factor in grading the seriousness of murders. The blameworthiness of the crime is taken into account at sentencing.<sup>167</sup> At that stage, aggravating factors such as those present in the *Anderson* case can be taken into account, so that the violence, duration, and inexcusable nature of a murder like that one can be reflected in a more severe sentence. At the same time, the sentence for a intentional murder such as that in the *Carroll* case, above, where the defendant killed under circumstances of provocation, can reflect fully the mitigating factors that were present there, without the automatic enhancement of the minimum sentence, by a vague premeditation-deliberation formula, that would result in Pennsylvania or California.

At the same time, imagine a defendant whose intent was to inflict injury just short of death, but the defendant is in the unsympathetic position of saying, “I guess I went too far, and I killed the victim. Gee, I’m sorry.” California might well treat this act as less than murder or, at

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<sup>164</sup> Tex. Penal Code § 19.02 (b)(1) (Vernon 2005).

<sup>165</sup> Tex. Penal Code § 6.03 (Vernon 2005).

<sup>166</sup> Intent exists when the result is the actor’s “conscious objective or desire.” Knowledge exists when the actor is “reasonably certain” that the actor’s conduct will cause the result. *Id.* These provisions are derived from § 2.02 of the Model Penal Code.

<sup>167</sup> The statute defines murder as a first-degree felony, and thus it carries a penalty imprisonment for 5 to 99 years or life. Tex. Penal Code §§ 12.32, 19.02 (c) (Vernon 2005).

the least, might not regard it as first-degree.<sup>168</sup> And it should be added, there will be cases in which the precise intent of the defendant—whether actually to kill, or whether to inflict injury as close as possible to death—cannot be known beyond a reasonable doubt, and although it would make sense to call the crime murder, and a serious grade of murder at that, a California jury might not be able to do so. By defining murder to include intent to cause serious injury, Texas enables the jury to find a verdict commensurate with the seriousness of this crime. At the same time, Texas limits the offense by an objective requirement: a simultaneous act by the defendant that, viewed extrinsically, is “clearly dangerous to human life.”<sup>169</sup>

## **2. A Real-Life Example: The “I Dare You to Kill Him” Murder**

Perhaps it is best to illustrate this contrast by analyzing an example under both sets of laws. I recall a case, from the days when I tried criminal cases frequently, that will help to compare these Texas laws to murder statutes conforming to the Pennsylvania pattern. We called it the “I Dare You to Kill Him” Murder, because it resulted when the killer responded, apparently reflexively, to a “dare.” A companion who happened to be present taunted the killer-to-be for reasons unknown, by saying, “I dare you to kill that guy,” whereupon the killer, apparently without thinking, raised his gun and did just that. The I Dare You to Kill Him Murder did not result in a published decision of any court, and I have been unable to reconstruct the precise evidence; nevertheless, I recall the crime with a vividness that probably results from its senselessness—and from thinking how poorly the Pennsylvania pattern would treat it. In the Criminal Law casebook of which I am a coauthor, the I Dare You to Kill Him Murder is stated

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<sup>168</sup> The intent to kill would be lacking, and therefore express malice would be absent. Cal. Penal Code § 188 (West 2005). The jury conceivably could find implied malice in the form of an “abandoned and malignant heart,” *Id.*, but this phrase creates other difficult issues. See *infra* Pt. II (B) of this Article (discussing second-degree murder).

<sup>169</sup> Intent to commit a serious injury assault is not enough, even if it causes death; the actor must also commit an “act clearly dangerous to human life.” Tex. Penal Code § 19.02 (b)(2). This requirement limits assaultive murder with an objective element.



hypothetically as follows:<sup>170</sup>

Two gang members, known as “Big Jim” and “Shorty,” are . . . waiting to do a drive-by shooting. They do not plan to kill anyone, just to leave a “calling card” by shooting up a rival’s home. Suddenly, a stranger on a bicycle, unknown to either of them, approaches. Big Jim says to Shorty, “I dare you to kill this guy.” Without hesitation, Shorty lifts his gun and shoots. It appears that Shorty’s conduct is a mere reaction, with no thought or purpose, and in fact Shorty is afraid of Big Jim and usually does what he tells him to do without question. The bullet pierces the man’s aorta and immediately kills the victim, who happens to be a first-generation immigrant working as a message deliverer to support his five children.

The reader can consider this example as hypothetical, if desired, although it correctly reflects a real case in its legally significant elements.

Murder, Pennsylvania style, would make a mess out of this case. The jury would be instructed to look for “premeditation” and “deliberation” in an act that is despicable precisely because is so bizarre, thoughtless, and inexcusable that an inquiry into these issues does not have much to do with the blameworthiness of the crime. The jury would be told that no particular time duration is required for premeditation and deliberation, an instruction that conflicts with the idea of distinct decisionmaking beforehand that is implied by premeditation and deliberation.<sup>171</sup> The trial court (and appellate judges) might then be required to second-guess the jury’s verdict by using standards not provided to the jury, including (in California) the *Anderson* factors.<sup>172</sup> This review, like the instructions to the jury, would not correspond at all to degrees of blameworthiness.

Specifically, using the *Anderson* factors, the appellate court probably would find that there was no “‘planning’ activity,” because the killer did nothing identifiable to prepare for

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<sup>170</sup> DAVID CRUMP et al., CRIMINAL LAW: CASES, STATUTES, AND LAWYERING STRATEGIES 32 (2005).

<sup>171</sup> See *supra* note 145 and accompanying text.

<sup>172</sup> See *supra* notes 121-29 and accompanying text.

killing this particular victim that was distinct from the killing itself. Since *Anderson* focuses on planning “activity,” rather than the (mental) planning that a premeditation requirement appears to call for, it seems to require a distinct “activity” beforehand, even though that factor may not correlate closely with blameworthiness. Here, there is none.<sup>173</sup> Then, there is the second *Anderson* factor: motive. It seems doubtful that the jury can find a preexisting motive to kill here, one that would support an inference of premeditation.<sup>174</sup> And finally, the third factor, that of a “particular and exacting” manner of causing death so as to support an inference of premeditation, is likewise absent, because the killer’s act was reflexive.<sup>175</sup> The crime is senseless, thoughtless, and bizarre, but California might exonerate the I-Dare-You killer of first degree murder precisely because his act was senseless, thoughtless, and bizarre.<sup>176</sup> Once again, the Pennsylvania pattern seems designed most of all to fit the genteel, intellectual killer of Agatha-Christie-type mythology, even though in fact it applies more broadly; and it produces nonsensical results when applied to the brutal, inexcusable kinds of murders of the real world—which are less romantic but far more common.

But really, the picture is more ambiguous than this analysis would imply. Does “‘planning’ activity” really mean an act distinct from the killing, after *Perez*? That opinion observed that the defendant had acted in a manner analogous to the “reloading” of a gun by obtaining a second knife after the first one broke.<sup>177</sup> There is no comparable action here, in the I

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<sup>173</sup> See *supra* notes 62-63 and accompanying text. Cf. LEVENSON § 5:12 (listing six actions, such as “bringing a weapon to the scene” and “threatening the victim” beforehand, that suffice). None of Professor Levenson’s six actions appear in the I-Dare-You Murder.

<sup>174</sup> See *supra* note 51 and accompanying text.

<sup>175</sup> *Id.*

<sup>176</sup> Actually, the California court has observed that first-degree murder can still exist even when the killing is “senseless” and “random,” *if* it is premeditated. See *supra* note 146 and accompanying text. But this rhetoric may not be useful. First, the jury is not told about it. See *supra* note 145 and accompanying text. Second, the *Anderson* factors still are guidelines for the courts about what qualifies as “premeditated.”

<sup>177</sup> See *supra* note 127 and accompanying text.

Dare You to Kill Him Murder. On the other hand, the killing was all one course of conduct in *Perez*. If we consider the killing in that way, perhaps planning activity is an unimportant factor, not one that should keep this I-Dare-You crime from being first-degree. As for “motive,” can it be inferred from the I-Dare-You statement? Perhaps the motive to support premeditation is there: a motive to avoid seeming less than macho, by responding to a dare. Although this is a dubious motive, it is an inferable one. On the other hand, one can infer that because the crime was reflexive and immediate, no motive sufficient for premeditation is present. Finally, there is the idea of “particular and exacting” means. But what does “particular and exacting means” mean? If it means the infliction of injury likely to cause death, a bullet through the aorta seems to qualify. If, on the other hand, one focuses on the shot itself—a spur-of-the-moment act here, without careful aiming—the inference of a “particular and exacting” means disappears.

Thus, the so-called guidelines for first-degree murder dissolve into the vaguest kind of ambiguity when applied to a real case. If that is to happen—if standards applied by reviewing courts are to turn into nothingness when used to resolve concrete cases—once again, let it be about something other than the definition of the most serious criminal offense in the Penal Code.

But we are not yet through. There also is the question of the viability of the *Anderson* factors themselves: whether *Anderson* is still good law after *Perez*. If we look at what the California court has said, the three *Anderson* factors are not to be used as exclusive or necessary requirements.<sup>178</sup> This conclusion might (or might not) lead to the upholding of a first-degree murder verdict in the I Dare You to Kill Him Murder. But if we look at what the California court in fact did with the three factors in *Perez*, which was to treat them as exclusive and necessary,

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<sup>178</sup> See *supra* note 126 and accompanying text. See also LEVENSON § 5:12 (discussing current views of *Anderson*).

the I Dare You to Kill Him Murder probably is not first degree.<sup>179</sup> The California court has not provided guidance that would tell us whether it is, or not.

And . . . the picture is even worse than this analysis would suggest. A criminal conviction requires proof beyond a reasonable doubt.<sup>180</sup> The jury will be told this, firmly, over and again, and judges reviewing the jury's decision will countermand the verdict if the required level of proof is not present. And the unpleasant reality is that no one can reconstruct this crime—the I Dare You to Kill Him Murder—with very much accuracy. The prosecution cannot prove the crime in its case in chief by questioning the killer.<sup>181</sup> Its best witness to the premeditation-deliberation issue is that fine citizen, Big Jim, the very provocateur who uttered the phrase, “I dare you to kill that guy.” But Big Jim has every reason to decline to testify. If he does testify, he has every motive to falsify. And if instead he testifies truthfully, the jury has every reason to discount his story—to find reasonable doubt about every aspect of it.<sup>182</sup> Therefore, the jury probably cannot obtain a precise picture of the events that control the premeditation-deliberation issue, and having reasonable doubts aplenty about that issue, it is required to acquit the killer of first degree murder even if that is what would result from accurate reconstruction.

A crime definition that depends exclusively on factors that are inherently subject to such proof vagaries is not a good definition. And one need only reflect for a moment to realize that the evidence will often present this kind of factual confusion when the issues are as subjective as premeditation and deliberation. Unless there is definitive evidence from an entirely believable source, the facts that determine premeditation and deliberation are going to remain ambiguous in

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<sup>179</sup> See *supra* note 127 and accompanying text.

<sup>180</sup> See, e.g., *In re Winship*, 397 U.S. 358 (1970) (recognizing burden as constitutionally required).

<sup>181</sup> U.S. CONST. amend. v.

<sup>182</sup> Cf. *Williamson v. United States*, 512 U.S. 594 (1994) (discussing potential lack of reliability in statements of coparticipants, on the ground that they may have motive to place blame on others falsely).

the courtroom, even if they would have been obvious to a neutral observer of the crime. Whenever the killer acts without witnesses (or with less than precise or credible witnesses, such as his own friends or coconspirators), the crime of first-degree murder may be unprovable even if everyone “knows” that it exists.<sup>183</sup> And this is a bad state of affairs, one that crime definition should avoid if possible.

There is another twist, perhaps even more strange than those described above, that would result if the I-Dare-You murder were to occur in California. As we have seen, the premeditation-deliberation formula is not the only kind of first-degree murder, because the statute also includes non-premeditated murders committed by poison, lying in wait, and certain other specified means. One of these other provisions happens to define as first-degree “any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death.”<sup>184</sup> It is here that the Pennsylvania pattern produces its most dubious outcomes. If Big Jim and Shorty are sitting on the curb while waiting to be picked up for their drive-by-shooting when Shorty fires his shot, the murder probably is second-degree, but if they are already in the car, it is first-degree. This distinction does not correlate with blameworthiness at all, and it is emblematic of the gaps left in the premeditation-deliberation formula.

Now, let us contrast these results under the Pennsylvania pattern to the Model Penal Code, as it appears in Texas law. The jury in Texas will be given a relatively clear question: did the defendant kill intentionally or knowingly? The precision of the bullet wound, to the

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<sup>183</sup> “Often, there is no witness to the killing; and even if there is a witness, the killer does not always speak his mind. So . . . the facts . . . must be determined from the defendant’s conduct (so far as we can learn of it, usually from circumstantial evidence) . . .” LAFAVE 768.

<sup>184</sup> Cal. Penal Code § 190 (West 2005). *See also* LEVENSON § 5:26 (discussing this kind of murder).

deceased's aorta, supplies enough to support this inference.<sup>185</sup> The alleged reflexiveness of the offense, even if inferable from the evidence, does not control the outcome, and neither do other vague unknowables, unrelated to blameworthiness, that the Pennsylvania pattern might use to determine premeditation and deliberation. If the jury remains unsure about the defendant's intent to kill (or knowledge that he is killing), the inference that he must, in a reasonable world, have intended at least to cause a grievous injury, together with the "act clearly dangerous to human life" that the defendant committed by shooting at a human being, independently supports a conviction for the unitarily graded crime of murder in Texas. This conclusion results from the second type of murder, defined by "intent to cause serious bodily injury."<sup>186</sup> Mitigating factors, such as the impulsiveness of the I-Dare-You crime (if that is thought to be mitigating), are taken into account at sentencing, as are the mitigating factors that the impulse did not originate with the defendant (but instead came from Big Jim) and that the killer may have acted because he was afraid of Big Jim. As it decides its verdict, the jury uses clear definitions, phrased in words that non-lawyers can follow. And those terms correspond closely to the standards that reviewing judges will use in deciding whether to uphold the jury's verdict, so that the courts can avoid second-guessing the jury on bases not contained in any statute and not known to the jury.

Results under this simpler Model-Penal-Code-based standard are likely to be more uniform. The verdict is less likely to be influenced by invidious considerations, such as whether the defendant is a type of person against whom the jury is prejudiced, and by the same token, the social class of a high-status individual is less likely to result in a verdict improperly lowered by jurors' predilections. The values of the people of the State are more likely to be carried out in the

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<sup>185</sup> *Cf. Rojas v. State*, 986 S.W.2d 241, 245-46 (Tex. 1998) (shooting of victim between the eyes sufficient to prove intent to kill). In addition, the "deadly weapon doctrine" may allow inference of intent from the use of a firearm, in many States. *See, LAFAVE* 734-35.

grading of the State's most serious crimes.

Above all, under the Model Penal Code formulation, the definition of the State's most serious crime is not separated from considerations of blameworthiness, as they are under the Pennsylvania pattern. The drafters of the Model Penal Code, which Texas closely followed, explained their reasons for rejecting premeditation and deliberation by pointing out the disconnect between these terms and rational crime grading.<sup>187</sup> In fact, as this article has observed, this thought occurred to the English historian Stephen as early as 1883,<sup>188</sup> and it has been repeated by modern writers. For example, Sean J. Kealy calls premeditation "a poor indicator of severity," and he asserts that there must be "better methods for determining which killings are worthy of society's most severe penalties." Premeditated killings, he adds, "are not necessarily the worst crimes; in fact, many unpremeditated killings shock society's conscience more than premeditated murders."<sup>189</sup> England has consistently declined to use premeditation in defining its modern crimes,<sup>190</sup> and American jurisdictions have increasingly rejected the premeditation-deliberation formula.<sup>191</sup> In fact, commentators from States using premeditation, including California, have argued that it should not be included in any new definition of

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<sup>186</sup> *Cf.* Manuel v. State, 2002 WL 834537 (Tex. App.) (unpublished opinion) (holding evidence of fatal shooting sufficient to support inference of intent to cause serious bodily injury).

<sup>187</sup> Comment, Model Penal Code § 210.2 Part II (1962).

<sup>188</sup> *See supra* note 100 and accompanying text.

<sup>189</sup> Sean J. Kealy, *supra* note 101, at 248.

<sup>190</sup> ROYAL COMM'N ON CAPITAL PUNISHMENT, REPORT 182-89 (1953).

<sup>191</sup> In addition to Texas, *see, e.g.*, Conn. Gen. Stat. Ann. § 53a-54b (West 1985); Del. Code Ann. § 636 (1979 & Supp. 1986); Ill. Comp. Stat. Ann. 91 (West 1987); Maine Rev. Stat. Ann. § 201 (West 2005); Wis. Stat. Ann. § 940, 01 (West 1982). *See generally* Sean J. Kealy, *supra* note 101, at 249 & nn. 348-49.

It should be added that rejection of degrees of murder, in favor of using the sentencing process to reflect differences in blameworthiness, substitutes sentencing discretion of the kind usually handled by judges for findings of fact by juries. The merits of judicial decisionmaking compared to that of juries is an old debate, of course, but this article does not intend to take sides on the general question.

Instead, the point is that sentencing discretion would provide a better mechanism for correlating results to blameworthiness than the dysfunctional jury discretion provided by the premeditation concept.

murder.<sup>192</sup> Texas, by way of contrast, arguably has preserved the connection between crime definition and blameworthiness by adopting a single degree of murder and authorizing the taking into account of differences in culpability and severity at sentencing.

All of these advantages are negated, however, by the unstructured “discretion” provided juries by the California statutes and by the *Anderson* factors. That discretion should be labeled as what it really is: lawless arbitrariness. States using the Pennsylvania pattern would do well to adopt the reasoning of the Model Penal Code by defining a single degree of murder, in terms that mean what they say.

## **II. THE MALICE AFORETHOUGHT CRITERION: DEFINING MURDER BY MISNOMER AND METAPHOR**

A separate problem with the Pennsylvania pattern is that all murder requires “malice aforethought.”<sup>193</sup> This is the defining mental state for murder. First-degree murder, as we have seen, also requires premeditation and deliberation, but malice aforethought is a necessary element of both degrees of murder, second-degree as well as first. In fact, this term is a key ingredient of the Pennsylvania pattern and is to be found in the laws of many States.<sup>194</sup> It traces to the common law and is deeply imbedded in Anglo-American jurisprudence.<sup>195</sup> It also is a term, however, that is subject to severe criticism; in fact, it makes for bad crime definition.

### ***A. Is Malice Aforethought an Unnecessary Double Misnomer?***

Malice aforethought does not require malice. Nor does it need to be preceded by any

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<sup>192</sup> E.g., Charles L. Hobson, *Reforming California's Homicide Law*, 23 PEPP. L. REV. 495, 520-21 (1996); Leo M. Romero, *Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico*, 20 N.M. L. REV. 55, 72 (1990).

<sup>193</sup> E.g., Cal. Penal Code § 187 (West 2005). See generally LEVENSON § 5:8 (discussing meanings of express and implied malice).

<sup>194</sup> See DAVID CRUMP et al., *supra* note 15, at 33-35 (explaining the term).

<sup>195</sup> Its development “required several centuries.” LAFAVE 725.



aforethought. As a common law term, it may have originated in cases where literal malice aforethought existed, but it has become a term of art.<sup>196</sup> It covers murders where no one is angry or acts with spite. It covers murders that are not premeditated or deliberate. In fact, it covers murders that are not even intentional; it is possible to act with malice aforethought by killing accidentally.<sup>197</sup> The term expanded through common law evolution to include such unintentional homicides as those resulting from certain kinds of assaults, those committed during felonies, those perpetrated while resisting arrest (possibly), and those exhibiting depravity: “depraved-heart” murder.<sup>198</sup> Malice aforethought became a flexible, useful term that simply stood for, and could be translated as, “the required mens rea for murder.” Most lawyers understand these principles from having taken Criminal Law courses.

But jurors do not come to court with an awareness of what the term “malice aforethought” means. It must be explained to them, and the explanation unfortunately must begin with the proposition that the jurors should not listen to the actual words of the judge’s charge, because they do not mean what they say. As Lafave puts it, the term is “misleading.”<sup>199</sup> Usually, malice aforethought is explained in instructions at the end of the case as either “express malice,” which can be supplied by “intent,” or as “implied malice,” which can be supplied by several means, such as proof that the defendant acted with an “abandoned and malignant heart” (or, in

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<sup>196</sup> *Id.* (observing that the phrase “does not even approximate its literal meaning”). It appears that early concepts of malice may have included an ingredient similar to today’s premeditation, although it was not used as it is today to separate degrees of murder. *See id.* 725. *See also* LEVENSON § 5:8 (“[t]he difficulty of defining ‘malice aforethought’ has been recognized by many courts”); Charles L. Hobson, *supra* note 56, at 495-507 (similar); Suzanne E. Mounts, *Malice Aforethought in California: A History of Legislative Abdication and Judicial Vacillation*, 333 U.S.F. L. REV. 313 (1999) (similar).

<sup>197</sup> *See infra* Pt. II(B) of this Article; *see also* LAFAVE 725-26.

<sup>198</sup> *See* LAFAVE 725-26, 737-65 (discussing these variants of malice). Resisting-arrest murder is a doubtful category. *See id.* at 765. *See also* Cal. Penal Code § 188 (West 2005) (distinguishing express malice, defined as intent, from implied malice, which in California uses the “abandoned and malignant heart” metaphor).

<sup>199</sup> LAFAVE 725.

some jurisdictions, with a “depraved heart”).<sup>200</sup> The instructions usually do not expressly say that the terms “malice” and “aforethought” do not mean what they say, although this is the real significance of the instructions.<sup>201</sup> The jury might as well be told that malice aforethought is a double misnomer: a label that means something quite different than what its words say, or rather, in this instance, a pair of labels used in misleading senses, as Lafave says. The task of educating the jurors about the meaning of malice aforethought early in the case usually falls to the prosecutor, and sometimes to the defense lawyer as well.<sup>202</sup> Usually, with the consumption of adequate time, the jurors can be reasonably educated about the fact that malice aforethought does not mean what it says. But that does not mean that jury instructions that contradict the jury’s task, or that require jurors to ignore the judge’s words, are a good idea.

I have had an unusual kind of experience with these issues, because early on, I tried murder cases under laws that required “malice aforethought” instructions, and later, I also tried murder cases in which the laws were phrased in terms of the Model Penal Code requirements of “intent” and “knowledge.”<sup>203</sup> In malice-aforethought cases, the jury voir dire required a lengthy colloquy with the jury, centered upon the fact that the instructions would not mean what they said when the jurors received them at the end of the case. “Mr. / Ms. Jones, you understand, do you not, that malice is just a word, and it does not mean what it says? That when the judge uses

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<sup>200</sup> *E.g.*, Cal. Penal Code § 188 (West 2005) (defining express and implied malice); LAFAVE 725-26, 733-37, 739-44 (same); LEVENSON § 5:8 (same).

*See* Committee on Standard Jury Instructions, California Jury Instructions—Criminal (CALJIC) § 8.11 (2005).

<sup>201</sup> The definition does indicate that a “pre-existing hatred” is not required, but it does not explicitly say that no “aforethought” at all is required, and it still could be taken to imply that a “contemporaneous hatred” is required, since a “pre-existing hatred” is not. Furthermore, the definition is subject to greater confusion when embedded in a complete charge full of word usages. *Cf. e.g.*, *People v. Conley*, 411 P.2d 911 (Cal. 1966) (reproducing suggested charge which, though superseded in some ways, defines malice aforethought in context).

<sup>202</sup> *Cf.* DAVID CRUMP, *supra* note 15, at 15, 50-51 (explaining tactics).

<sup>203</sup> This experience was as an assistant district attorney for Harris County [Houston], Texas, from 1972 through 1975. During this time, Texas adopted a new Penal Code that was based on the MPC. *See supra* notes 161-63 and accompanying text.

it, it really just means intent, or a ‘depraved heart’?” This questioning would be followed by the same treatment of the term, “aforethought,” and all of it would be preceded by an explanation of the double misnomer contained in the key phrase. It was difficult to accomplish this jury-education function, however, consistently with meaningful jury examination, because many judges before whom I practiced preferred to have the voir dire for each side concluded within a half hour to an hour. The effort spent unraveling the meaning of malice aforethought consumed a major part of that time, making it impractical to address other important subjects.<sup>204</sup> Even aside from the limitations imposed by time, jurors are like other human beings and can absorb only a certain number of foreign concepts at one sitting. The principles involved in understanding the non-terminology of malice aforethought always seemed to elbow out understanding of other important concepts. After the Model Penal Code version became the law in Texas, juries seemed to understand from the beginning the definitions of murder, lesser offenses, and defenses, about which they had seemed confused before. And a jury that comprehends the law while hearing the evidence seems more likely to acquit or convict in accordance with the law.

Again, let me emphasize that it usually is possible to educate the jury about malice aforethought. I doubt that many jurors decide murder cases believing that murder can only result from ill will or spite, or that murders can only result from thinking about killing beforehand, because the voir dire or opening statement or final argument, if done competently, will inform them otherwise. This is by no means the most serious defect in the Pennsylvania pattern. The fact remains, however, that the double misnomer in malice aforethought is unnecessary. It could be remedied by a simple but elegant solution: the legislature could delete the phrase, “malice aforethought” entirely, and instead use the definitions that are to be given of that phrase. The

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<sup>204</sup> The trial of a murder indictment often involves multiple lesser included offenses as well as multiple defensive theories. Each of these also has multiple elements that the jury must understand.

phrase, malice aforethought, contributes nothing, and more specific instructions, to the effect that the guilty mental state can be supplied by an “intentional” killing or by a killing accompanied by the conditions corresponding to an “abandoned and malignant heart,”<sup>205</sup> would convey all of the meaning that there is to convey.

This solution would eliminate the wasted time consumed by the need to explain the misnomer. It would prevent that explanation from crowding out an understanding of other important principles. And although I doubt that malice aforethought is frequently a misleading factor (because competent lawyers address it carefully), there probably are instances in which the double misnomer does result in miscarriages of justice, both by inappropriate conviction and by inappropriate acquittal.<sup>206</sup> The malice-aforethought distractant, it should be remembered, is cumulative of the confusion created by the premeditation requirement. “Premeditation” does suggest a kind of “aforethought” element, and so jurors must understand that the malice-aforethought issue is different. They must separate out the aforethought aspect of first degree murder from the non-aforethought that is required for murders generally, even though the jury instructions literally call for “aforethought” for all murders. Each of these concepts requires jurors to cross-reference different parts of the judge’s instructions, and the law recognizes that repeated cross-referencing creates confusion in lay readers.<sup>207</sup> The malice label, too, may linger

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<sup>205</sup> In fact, California has adopted this kind of omission and substitution for another phrase, “abandoned and malignant heart.” Although this phrase is in the California murder statute, CALJIC § 8.11 omits it from jury instructions defining malice and instead informs the jury only of the underlying meaning. See *infra* notes 223-25 and accompanying text.

<sup>206</sup> For example, it seems possible that some occasional jurors may erroneously have inferred “malice,” and therefore murder, from the fact that a particular defendant acted in anger, when they would have acquitted the defendant of murder and opted instead for manslaughter, if the misleading literal meaning of “malice aforethought” had not lingered with them. And the opposite also is possible: an irrational acquittal resulting from the absence of hatred or anger. These events likely are infrequent, but they seem likely to occur sometimes, and any occurrence of them is unnecessary—except for the persistence of the double misnomer in the definition of murder.

<sup>207</sup> See, e.g., *Wheatly v. Myung Sook Suh*, 504 A.2d 792, *aff’d*, 525 A.2d 340 (N.J. App. 1987) (applying New Jersey’s Plain Language Act to impose damages upon proponents of a confusing contract, including “[c]ross references that are confusing” as one indicator of unacceptable text). And, of course, there are many articles about

to cause confusion. It is not beyond the realm of possibility that the existence of ill will between killer and victim, even though not exhibited in the killing itself, could tip the jury into finding murder when it would find only manslaughter if instructed without the misnomer, and likewise, the absence of spite or anger could result in a manslaughter conviction when the jury would have properly found murder if instructed in a more straightforward manner.

Add to all of this the ingredient of skillful lawyering by an attorney on one side or the other, who is determined to use the malice aforethought instruction to make it mean something that, properly defined, it should not, and the possibility of miscarriage of justice is multiplied.<sup>208</sup> Finally, there is an inherent danger in jury instructions from the judge that require telling the jury that the instructions do not mean what they say. The recognition that the judge's instructions contain meaningless gobbledygook might easily expand into a general suspicion by jurors that other parts of the charge can similarly be ignored or redefined. The jury usually attempts to follow the charge,<sup>209</sup> and it does not seem wise to create disrespect for this effort.

The Model Penal Code avoids these disadvantages by eliminating the double misnomer of malice aforethought. The malice terminology at one time may have been useful as a matter of common law evolution, but then, horses and buggies once were useful means for Californians and Pennsylvanians to travel to work, and keeping the malice formula today has about as much to commend it. The Texas approach, based on the MPC, uses intent and knowledge, followed by

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the intelligibility of jury instructions. See, e.g., Dean E. Murphy, *New Language for Jurors in California: Plain English*, N.Y. Times, Aug. 28, 2005 at 112; *Final Approval of Amendments to Jury Instructions Under Rule 226a*, Texas Rules of Civil Procedure, 68 Tex. B.J. 202, 204 (2005).

<sup>208</sup> See DAVID CRUMP et al, *supra* note 15, at 51.

<sup>209</sup> See generally HARRY A. KALVEN & HANS ZEISEL, THE AMERICAN JURY 219, 220-41 & n.31 (1966) (concluding that juries usually follow charges, although they may emerge with erroneous notions if charges are not clearly explained to them).

definitions that correspond to common uses of those terms.<sup>210</sup> Extensive cross-referencing is not necessary, nor does the jury need to be told that words in the charge do not mean what they say.

***B. Adjudication by Metaphor: “Depraved Heart” Murder***

And there is an even more serious defect contained within the malice formula. So called “express” malice often is defined under the Pennsylvania pattern as intent.<sup>211</sup> Aside from the unnecessary rigmarole that it takes to get this point across because of the malice misnomer, intentional murder seems reasonably likely to be understandable to lay jurors. But there are other categories of malice aforethought called “implied” malice. One kind, which arises frequently, is “depraved heart” murder, or as the California statutes put it, murder committed unintentionally, but with an “abandoned and malignant heart.”<sup>212</sup> This statutory provision attempts to achieve a kind of crime definition by literary metaphor.

Defining legal duties by metaphor is a bad idea. Poets use metaphors, and in special situations so do other kinds of writers. But poets usually employ them for very different reasons than to define crimes or to convict and punish people. Poetic metaphors are usually designed to show abstract truths in a way that sounds good, that surprises the ear, and that challenges the reader. In fact, confusion often is part of the literary character of a figure of speech: a felicitously sonorous phrase that means two or more distinct things at the same time.<sup>213</sup> The figure of speech contained in the line, “O, my love’s like a red, red rose,” could not be used very well to explain

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<sup>210</sup> See *supra* notes 163-66 and accompanying text.

<sup>211</sup> Cal. Penal Code § 188 (West 2005).

<sup>212</sup> *Id.* See generally LEVENSON § 5:8 (discussing this kind of murder). There is yet another kind of implied malice in California based on a complex concept called the “provocative act” doctrine, which can apply, for example, to a defendant who initiates a gun battle in which another perpetrator kills. LEVENSON § 5:9. The provocative act doctrine is beyond the scope of this article, except to the extent that it might be observed that this is another unruly set of complexities that would be unnecessary if California adopted a more straightforward homicide law.

in a literal way what the author's love is really like.<sup>214</sup> A metaphor is a species of analogy, and usually it is a far-fetched analogy at that. In any event, analogy is a type of inductive logic in which one thing is inferred to be similar to another in one aspect because of ostensibly unrelated similarities in another aspect, and it requires careful selection of the similarities upon which to build the metaphor and careful restriction of the inferences to be drawn from them.<sup>215</sup> For precision, reasoning by analogy is inferior to the deductive logic that proceeds from definitions.<sup>216</sup> A standard dictionary does not depend upon metaphors to define the meaning of words, and neither should jury instructions.

In particular, a metaphor such as “abandoned and malignant heart” is too indeterminate to serve well in crime definition.<sup>217</sup> What does it mean? Most of us, from time to time, display what might be labeled an “abandoned and malignant heart” in our dealings with some moral dilemmas, but that does not mean that we display the state of mind corresponding to blameworthiness for murder. The resulting jury instruction, if it uses these words, resembles telling a group of decisionmakers, “Decide whether you think the defendant is as evil as a pomegranate, and if so, convict him of murder.” “As evil as a pomegranate,” although less familiar, conveys about as much information as “abandoned and malignant heart” does in

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<sup>213</sup> See RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 851 (1995) (defining the term as “application of a word or phrase to an object or concept that it does not literally denote . . .”). For criticism of this approach, see Charles L. Hobson, *supra* note 56, at 499-500).

<sup>214</sup> The line is from Robert Burns's poem, *A Red, Red Rose*. See [www.worldburnsclub.com/poems/translations/a\\_red\\_red\\_rose.htm](http://www.worldburnsclub.com/poems/translations/a_red_red_rose.htm) (Nov. 13, 2005).

<sup>215</sup> See DAVID CRUMP, HOW TO REASON ABOUT THE LAW: AN INTERDISCIPLINARY APPROACH TO THE FOUNDATIONS OF PUBLIC POLICY 1-5 (2005) (explaining analogy as a type of induction).

<sup>216</sup> *Id.*

<sup>217</sup> For discussions of the disadvantages of this kind of crime definition, see Michael H. Hoffheimer, *Murder and Manslaughter in Mississippi: Unintentional Killings*, 71 MISS. L.J. 35, 109-23 (2001) (discussing Mississippi's version, including the possibility that the metaphor “may have no meaning at all”); John Rockwell Snowden, *Second Degree Murder, Malice, and Manslaughter in Nebraska: New Juice for an Old Cup*, 76 NEB. L. REV. 399 (1999) (discussing Nebraska's version); Abraham Abrahamovsky, *Depraved Indifference Murder Prosecutions in New York: Time for Substantive and Procedural Clarification*, 55 SYRACUSE L. REV. 455 (2005) (discussing New

defining murder. One commentator suggests that the depraved-heart metaphor may have “no meaning at all.”<sup>218</sup> As this article has observed in connection with the premeditation-deliberation formula, there is a long line of cases in which the United States Supreme Court has insisted upon relatively precise definition of crimes, and the Court has explained that the principal reason is to confine the decisions of governmentally empowered actors.<sup>219</sup> This concern includes jurors who are given instructions about convicting a defendant of murder.

In fact, there have been defendants who have argued that the depraved-heart metaphor is so indeterminate that it is unconstitutional. In *Thomas v. State*,<sup>220</sup> for example, a defendant in Nevada was sentenced to death for a murder. He argued on appeal that the jury charge, which contained an instruction allowing conviction for murder committed with an “abandoned and malignant heart,” denied him due process because “it uses terms that are archaic, without rational content, and merely pejorative.” The court observed, however, that it had “previously rejected these contentions” and dismissed the argument with a string citation.<sup>221</sup> The court arguably was correct in holding that depraved heart murder is not unconstitutional, if only because that holding would judicially outlaw the use of a term that was current at the time of the founding of the United States<sup>222</sup> and that has existed in the majority of States. But the defendant’s criticisms had a point to them: depraved heart murder is, indeed, “archaic, without rational content, and merely

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York’s analogous definition, which the courts have changed to an objective formula); LEVENSON § 5:8 (“‘abandoned and malignant heart’ is not well defined”; preferring definition that does not use this phrase).

<sup>218</sup> Michael H. Hoffheimer, *supra* note 217, at 111.

<sup>219</sup> See *supra* notes 80-94 and accompanying text.

<sup>220</sup> 83 P.3d 818 (Nev. 2004).

<sup>221</sup> *Id.* at 827.

<sup>222</sup> The depraved-heart terminology traces at least as far back as 1762. SIR MICHAEL FOSTER, CROWN LAW 265 (1762), as quoted in *Darry v. People*, 10 N.Y. 120, 139. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 199 (1769), gives several examples of the kind of “wicked, depraved and malignant heart” that can supply malice. For pre-constitutional use of the term in America, see, e.g., *State v. Norris*, 2 N.C. (1 Hayw.) 429, 445 (1796) (reflecting a jury charge using Blackstone’s language).



pejorative.” At the very least, a legislature or a reviewing court exercising supervisory authority over jury instructions should require a more precise definition of the crime of murder before a death sentence can be imposed.

This is one way, actually, in which some pattern jury instructions in California arguably have evolved for the better. Jury instructions on implied malice found in CALJIC 8.11 omit the “abandoned and malignant heart” metaphor. Instead, they substitute meaningful and intelligible language:<sup>223</sup>

. . . Malice is implied when:

1. The killing resulted from an intentional act;
2. The natural consequences of the act are dangerous to human life; and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

The problems raised by this instruction, however, are significant. The first is that this formulation, by omitting the “abandoned and malignant heart” formula, does not use the statutory language passed by the legislature. One can argue that it translates the legislation into different words and thereby changes the meaning enacted by the lawmaking body (although that conclusion depends upon discerning a coherent legislative meaning). Courts in other jurisdictions may feel a proper reluctance to substitute a newly invented phrase for that contained in the statute. This conjecture may lie behind Nevada’s repeated rejection, mentioned above, of complaints against the definition of depraved heart murder. Second, the substituted definition is

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<sup>223</sup> Committee on Standard Jury Instructions, California Jury Instruction—Criminal (CALJIC) § 8.11 (West 2005). The court in *People v. Dellinger*, 783 P.2d 200, 205 (Cal. 1989), found “no error” in giving an earlier version of this instruction, although it cautioned that it could be error if combined with arguments undermining its subjective requirements.

In fact, the California Supreme Court has disapproved instructions that depend upon the “abandoned and malignant heart” language. *People v. Phillips*, 414 P.2d 353 (Cal. 1966) (reasoning that the language was misleading). On the other hand, it can be argued that a court should not substitute its own standard for that of the legislature, and that the statutory words should be included, even if they are to be followed by interpretive instructions.

not as readily intelligible as it seems. For example, the word “deliberate” as used here does not mean what the same word means in the definition of first-degree murder. The cases caution that it means only intent here,<sup>224</sup> and the jury must keep the difference in mind to apply the definition correctly (although it may not be told about this fine distinction, because it is not mentioned in CALJIC 8.11). Finally, the definition of depraved-heart murder in California seems to remain in flux, with two possible branches, one of which stresses objective criteria such as “wantonness” more than the other, which is a more clearly subjective branch.<sup>225</sup> The better solution would be legislative revision that gets rid of the depraved-heart metaphor and substitutes clearer language.

Furthermore, in Pennsylvania-pattern jurisdictions that continue to use the depraved heart metaphor to instruct juries, the terminology is not merely indeterminate. It also is defective for the additional reason that it invites the jury to make its decision on an invidious basis. Most people who commit murders or manslaughters exhibit judgmental processes that are subject to criticism and that can be labeled “depraved” or “abandoned and malignant.” After all, involuntary manslaughter corresponds to (and often is defined in terms of) “recklessness,”<sup>226</sup> and recklessness in some jurisdictions involves conscious indifference to a substantial and unjustified risk of killing another.<sup>227</sup> It can be appropriate in some cases to describe that state of mind as “depraved,” at least in the ordinary discourse with which most jurors are familiar. Thus, the depraved-heart metaphor is not very useful as a distinction between murder and manslaughter, even though that is precisely the function assigned to it. Furthermore, the depraved heart

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<sup>224</sup> See *People v. Saille*, 820 P.2d 588, 594-95 (Cal. 1991).

<sup>225</sup> See *infra* notes 235-38 and accompanying text (discussing the ongoing case of *People v. Noel*).

<sup>226</sup> Recklessness is the mens rea required by the Model Penal Code, although the MPC does not explicitly distinguish involuntary manslaughter from voluntary. American Law Institute, Model Penal Code § 210.3 (1962). California uses recklessness to define involuntary manslaughter but uses the term confusingly together with other terms such as gross negligence. See *infra* note 237; see also Pt. IIIB of this article (discussing this offense).

<sup>227</sup> Again, this is the Model Penal Code formulation. *Id.* § 2.02(2)(c).

metaphor does not prevent jurors from considering matters of “depravity” unrelated to the murder itself, or even from convicting the defendant, not because of his criminal behavior in this case, but because of who he is: because the jurors do not like him and consider him “depraved.” It should be added that the subjective depraved-heart instruction usually is accompanied by objective charges about its meaning, which may tell the jury that an “extreme indifference to the value of human life” is required.<sup>228</sup> This kind of instruction probably helps to confine the vagueness and misleading nature of depraved heart murder, but “depravity” or an “abandoned and malignant heart” may remain the principal message. It is too vivid and picturesque to be redefined by more precise but less interesting images.

Cases involving accusations of murder for killings by dogs are an example of these disadvantages. In *Berry v. Superior Court*,<sup>229</sup> the defendant used a tethered pit bull dog, which he knew was capable of killing, to guard his marijuana plants. A two-year-old boy who resided nearby strayed into an area within reach of the dog, which mauled and killed the toddler. The judge who presided over the defendant’s preliminary hearing bound him over for trial for murder. On the defendant’s application for writ of prohibition, the court of appeals upheld the murder charge as presenting a jury question. The court reasoned,<sup>230</sup>

[The case law recognizes] two prerequisites for affixing second degree murder liability upon an unintentional killing. One requirement is the defendant's extreme indifference to the value of human life, a condition which must be demonstrated by showing the probability that the conduct involved will cause death. Another requirement is awareness either (1) of the risks of the conduct, *or* (2) that the conduct is contrary to law. Here, evidence of the latter requirement is

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<sup>228</sup> *Cf. Id.* § 210.2(1)(b) (MPC definition of murder).

<sup>229</sup> 256 Cal. Rptr. 344 (1989) (ordered not published; previously published at 208 Cal. App.3d 783).

In addition to dog mauling cases, there are other situations that uncomfortably straddle the murder-manslaughter divide. Other important examples include vehicular homicides where drivers are heavily under the influence, such as *People v. Watson*, 30 Cal.3d 290 (1981), and some kinds of homicides resulting from child maltreatment or neglect, *People v. Burden*, 72 Cal. App.3d 703 (1977).

<sup>230</sup> 256 Cal. Rptr. at 348-50.

first, that the very possession of [the dog] may have constituted illegal keeping of a fighting dog. Second, there is evidence that defendant kept [the dog] to guard marijuana plants, also conduct with elements of illegality and antisocial purpose. Thus the second element . . . required could be satisfied here in a number of ways.

Thus there is a basis from which the trier of fact could derive the two required elements of implied malice, namely existence of an objective risk and subjective awareness of that risk. Additionally, there is arguably some base and antisocial purpose involved in keeping the dog (1) because harboring a fighting dog is illegal and (2) because there is some evidence the dog was kept to guard an illegal stand of marijuana. Illegality of the underlying conduct is not an element of the charge, but may be relevant on the issue of subjective intent.

In other words, the use of a non-fighting dog might have changed the result, even if the defendant had known of an identical risk that the dog would kill. So would have the use of the dog to guard something that was not independently illegal, such as money. It is unclear why those factors should determine something so fundamental as the difference between guilt and innocence of murder, as opposed to furnishing factors that might be taken into account at sentencing.

The California Supreme Court's treatment of *Berry* after the court of appeals's affirmance confused the issue. Although the court of appeals opinion had already been published, the California Supreme Court retroactively ordered that this opinion not be officially published.<sup>231</sup> This action deprived the opinion of precedential value.<sup>232</sup> But the supreme court also denied review, meaning that the trial of Berry for murder could proceed.<sup>233</sup> There is no way to know the reasoning that prompted the court to take these actions, but speculation, which is all we have left, probably would have to center on the inference that the court did not believe it could make sense out of the law of depraved heart murder and its distinction from manslaughter in a way that would justly resolve the case presented by these facts. The aftermath was that the

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<sup>231</sup> 256 Ca. Rptr. at 344.

<sup>232</sup> Cal. Rules of Court 976, 977, 979 (West 2005).

People prosecuted Berry for murder, but the jury returned a verdict acquitting him of murder and convicting him instead of the lesser offense of involuntary manslaughter.<sup>234</sup> Again, it is difficult to know why.

Later decisions in which murder has been charged after deaths resulting from dog maulings have produced inconsistent results from juries and judges. Most recently, for example, in *People v. Noel*,<sup>235</sup> the jury convicted the defendant of second-degree murder after her dogs mauled a neighbor to death. The trial court then granted the defendant a new trial because it had reconsidered the instructions on implied malice. The court of appeals reversed the new trial, on the ground that “subjective awareness” of a “high probability of death,” which had been the standard used by the trial court, was not required. Instead, the standard involved either (1) a “base, antisocial motive [with] wanton disregard of life” or (2) “conduct [that] endangers the life of another” coupled with “conscious disregard for life.”<sup>236</sup> The first standard combines a vague subjective mens rea (motive) with an amorphously defined objective aspect (wantonness). The second is confusingly similar to frequent definitions of recklessness, which is a typical basis for manslaughter in most jurisdictions, not murder.<sup>237</sup> The California Supreme Court has granted review in *Noel*,<sup>238</sup> and there is a chance that the court may clarify the standard to distinguish

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<sup>233</sup> 256 Cal. Rptr. at 344.

<sup>234</sup> See *People v. Berry*, 1 Cal. App.4<sup>th</sup> 778, 2 Cal. Rptr. 416 (1991).

<sup>235</sup> 28 Cal. Rptr.3d 369 (2005) (review granted; previously published at 128 Cal. App.4<sup>th</sup> 1391). See also LEVENSON § 5.8 (discussing *Noel*).

<sup>236</sup> 28 Cal. Rptr. at 411.

<sup>237</sup> See *supra* notes 223-24 and accompanying text.

It should be added that California uses both “gross negligence” and “recklessness” to define its offense of involuntary manslaughter. *Id.* at 410, quoting *People v. Penny*, 285 P.2d 926 (Cal. 1955) (defining involuntary manslaughter in terms of “aggravated, gross, reckless conduct” and also quoting cases requiring only “gross negligence”). The statute requires a killing “without due care or circumspection,” which actually sounds like ordinary (civil) negligence. Cal. Penal Code § 192(b) (West 2005). See also *infra* Pt. IIIB of this article (analyzing California’s involuntary manslaughter).

<sup>238</sup> See *supra* note 232.

murder clearly from manslaughter and avoid vague words such as “wanton.” Reduction of depraved-heart murder to a unitary definition featuring conscious indifference to human life as a subjective requirement, combined with a required objective element of an act dangerous to human life, would rationalize this standard in a manner consistent with the statute.<sup>239</sup> It still would remain difficult to distinguish from manslaughter, but it would improve the Pennsylvania pattern.

Again, I believe that the Model Penal Code, as it is reflected for example in the law of Texas, is superior to this California confusion. Texas flatly would not authorize an indictment for murder in a case such as *Berry* or *Noel*. The defendants there did not act intentionally or knowingly to kill, did not intend serious bodily injury, and did not commit a causally related felony, and thus they would not have qualified for conviction under the Texas murder statute.<sup>240</sup> Instead, with evidence of recklessness, Texas would authorize indictment and conviction for manslaughter.<sup>241</sup> One can argue persuasively that some reckless killings should be characterized as murders, as they would be in a depraved-heart jurisdiction such as California but would not be in Texas. For example, if an enraged, jilted lover were to drive an automobile onto a busy sidewalk, killing a dozen people, although not aiming at anything in particular, shouldn’t his act be murder? A partial answer is that it probably would be murder in Texas, if the defendant acted “knowingly” with respect to the probability of killing. But even if the “knowingly” argument fails, the clarity and absence of ambiguity with which the crime can be set forth in Texas is a

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<sup>239</sup> The statute defines “implied malice” in terms of an “abandoned and malignant heart,” so that the court must retain this kind of murder to remain faithful to the legislation. Cal. Penal Code § 188 (West 2005).

<sup>240</sup> See *supra* note 163 and accompanying text.

<sup>241</sup> Tex. Penal Code § 19.04 (Vernon 2005). This crime involves recklessness or conscious disregard of risk, which is distinct from the mental state of gross negligence. See *infra* note 242 and accompanying text (explaining recklessness); note 291 (explaining criminal negligence). Thus, although manslaughter in Texas superficially seems to correspond to involuntary manslaughter in California, the Texas crime requires subjective awareness of danger and carries a longer sentence than the California crime, which can be made out by inadvertence.

positive value in the criminal law.

A jury in this MPC-influenced jurisdiction would be instructed straightforwardly about this crime, in terms of a concept of recklessness that would be explained by a definition consistent with the common understanding of that term. A conviction for manslaughter in Texas, which is based closely on the Model Penal Code, carries a maximum penalty of twenty years imprisonment.<sup>242</sup> more than enough to allow a sentence in *Berry*, for example, commensurate with the defendant's relative blameworthiness. There would be no need for an application for writ of prohibition or for a court of appeals opinion interpreting "abandoned and malignant heart" in terms of marijuana plants. There would be no need for a Supreme Court order avoiding the question but retroactively assigning a published opinion to nonpublished status. There probably would be less inconsistency among juries and judges, if such a case had arisen in a Model Penal Code jurisdiction, because both the insufficiency of the evidence for murder, and its sufficiency for manslaughter, would be relatively unambiguous.

### **III. MANSLAUGHTER: LESSER-DEGREE HOMICIDES**

#### ***A. Voluntary Manslaughter: A Passion Killing, Arising from an Adequate Cause***

The California law of voluntary manslaughter, unlike the law of murder, does not exhibit so many arguable deficiencies. In fact, it avoids some of the mistakes that the drafters of the Model Penal Code fell into in defining this crime. The California law of voluntary manslaughter<sup>243</sup> is functionally similar to the law in Texas governing passion killings, except that Texas does not create a differently labeled crime—in Texas, the crime remains murder, even if committed under passion circumstances, and the provocation element is reflected in a lessened

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<sup>242</sup> Tex. Penal Code §§ 12.33, 19.04 (Vernon 2005) (defining manslaughter as second-degree felony; setting maximum for this degree).

sentencing range, analogous to the lesser sentence for the passion crime in California. Also, Texas places upon the defendant the burden of proving the factual elements for this reduction.<sup>244</sup> It can be argued that the Texas version is preferable, and I would argue this; in truth, however, the structural<sup>245</sup> differences are debatable.

The California statute defining voluntary manslaughter provides that this crime exists when the killing is “without malice” because it arises “upon a sudden quarrel or heat of passion.”<sup>246</sup> If this were all that there was to it, the definition would be inadequate, because it would allow hotheads to invoke the lesser crime whenever they felt passion, without a requirement that the passion arise from a recognizably passion-producing source.<sup>247</sup> Therefore, Pennsylvania<sup>248</sup> and California<sup>249</sup> are like many other jurisdictions<sup>250</sup> in imposing additional requirements by judicial interpretation. These additional elements typically fall into four further categories: an adequate cause<sup>251</sup> underlying the passion, an objective measure of the adequacy of

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<sup>243</sup> Cal. Penal Code § 192 (West 2005) (defining this offense as occurring “upon a sudden quarrel or heat of passion”). See also LEVENSON § 5:49-5:52 (discussing this degree of homicide); Charles L. Hobson, *supra* note 56, at 503-07 (same).

<sup>244</sup> Tex. Penal Code § 19.02(d) (Vernon 2005).

<sup>245</sup> The statutes, that is to say, are functionally different, but only slightly so. Adjudication is another, completely different issue.

<sup>246</sup> See *supra* authority cited in note 243.

<sup>247</sup> Cf. *Commonwealth v. Flax*, 200 A. 632, 637 (Pa. 1938) (declaring that although the law has “some tolerance” for an act impelled by “a justifiably passionate heart,” it has “no tolerance whatever” for an act produced by a “malicious heart”).

<sup>248</sup> See *supra* note 247.

<sup>249</sup> E.g., *People v. Borchers*, 50 Cal.2d 321, 325 P.2d 97 (1958).

<sup>250</sup> See DAVID CRUMP et al., *supra* note 15, at 52-53; see also LAFAVE 777, 788 (offering a different but closely similar formulation).

<sup>251</sup> Cf., e.g., *State v. Avery*, 120 S.W.3d 196 (Mo. 2003) (en banc) (holding that adequate cause “may include terror,” but it must be “so extreme that for the moment, the action is being directed by passion, not reason”). With respect to California, see authority cited in *supra* note 249; as to Texas, see Tex. Penal Code § 19.02(a) (Vernon 2005) (defining adequate cause statutorily). See also LEVENSON § 5:50 (discussing California’s version).

In most jurisdictions, including California and Texas, the so-called “imperfect-self-defense” theory can supply the “passion.” The coverage in both States is plain from the text of the statutes, since California includes a “sudden quarrel” and Texas includes “terror.”



the cause by reference to the common (or ordinary or average) person,<sup>252</sup> an element of suddenness or immediacy that prevents “cooling” of the passion,<sup>253</sup> and a requirement that the origin of the passion be traceable to the person killed or others acting with that person.<sup>254</sup> Thus, a perception that the intended victim has been intimate with the killer’s spouse,<sup>255</sup> or an attack by the deceased that provokes the killer but that does not rise to the level that justifies self defense,<sup>256</sup> are traditional kinds of adequate causes. But circumstances that would not impair the reasoning of an ordinary person, such as the deceased’s resistance to the defendant’s request for money,<sup>257</sup> or (in some jurisdictions) a nonthreatening sexual advance,<sup>258</sup> would not invoke

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<sup>252</sup> *E.g.*, *People v. Steele*, 27 Cal.4<sup>th</sup> 1230, 47 P.3d 225 (2002) (rejecting argument based on defendant’s alleged “psychological dysfunction based on traumatic experiences in the Vietnam War” and that “he ‘snapped’ when he heard [a] helicopter” because it “does not satisfy the objective, reasonable person requirement” but is closer to “diminished capacity,” which “the legislature has abolished”); *see also* Tex. Penal Code § 19.02(a) (Vernon 2005) (requiring measurement by “person of ordinary temper” in statute). *See* LAFAVE 784; LEVENSON § 5:50.

<sup>253</sup> *Cf.* *State v. Mauricio*, 117 N.J. 402, 568 A.2d 879 (1990) (declaring that the time adequate for “cooling off” is not measured by any definition “yardstick” but depends upon such factors as the extent of the passion and the nature of the provocation). With respect to California, *see* authority cited in *supra* note 249; as to Texas, *see* Tex. Penal Code § 19.02 (d) (Vernon 2005) (requiring by statute that the act occur under the “immediate influence” of “sudden passion”). *See also* LEVENSON § 5:51 (discussing California requirement of no “sufficient cooling-off period”).

LAFAVE 786 divides this factor into two subissues: (1) that an objectively “reasonable” time to cool off has not expired and (2) that the defendant subjectively has not in fact cooled off. Thus, if the defendant is unusually cold blooded, has cooled off in less time than the average or reasonable person, and kills without passion, the offense is murder, not manslaughter. *Cf.* *People v. Pouncey*, 437 Mich. 382, 471 N.W.2d 346 (1991) (holding that defendant’s own testimony that he was “not angry” barred manslaughter instructions in spite of passion-producing event).

<sup>254</sup> *E.g.*, *State v. Turgeon*, 165 Vt. 28, 676 A.2d 339 (1996) (holding that “heated exchange” between husband and wife did not extend the possibility of manslaughter to killing of “a third party who was not involved in the initial altercation,” here a state trooper pursuing husband). *See also* LEVENSON § 5:50 (explaining California requirement of causation by victim or at least of reasonable belief in causation by victim). With respect to Texas, *see* § 19.02(a) (Vernon 2005) (declaring by statute that passion must arise out of “provocation by the individual killed or another acting with the person killed”).

<sup>255</sup> *Cf.* *Maier v. People*, 81 Am. Dec. 781 (Mich. 1862) (reversing conviction for assault with intent to murder where trial court excluded evidence allegedly showing assault committed shortly after defendant learned circumstances suggesting tryst between victim and defendant’s wife).

<sup>256</sup> *Cf.* *State v. Avery*, 120 S.W.3d 196 (Mo. 2003) (en banc) (requiring manslaughter instruction even if jury were to reject self-defense where defendant testified to conduct of deceased that assertedly frightened her).

<sup>257</sup> *E.g.*, *Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky. 2004) (deciding case under Kentucky’s “extreme emotional disturbance” standard derived from Model Penal Code; holding that “reasonable explanation or excuse” required by statute gained from MPC, was not supplied here by recent death of defendant’s former boyfriend, or argument with current boyfriend, or drug dependency, or victim’s refusal to provide money for drugs).

<sup>258</sup> *E.g.*, *People v. Page*, 737 N.E.2d 264 (Ill. 2000) (holding alleged same-sex advance insufficient to raise issue of manslaughter; rejecting “homosexual panic” theory). But the exact point at which to end this rejection of sexual advance, and to accept sexual overtures as a basis for manslaughter, is controversial. *Cf. Id.* (suggesting that a

voluntary manslaughter. A killing taking place days later, after a time of brooding, also does not qualify, on the theory that suddenness is more indicative of lesser behavioral control and therefore lesser blameworthiness than action taken after mature reflection. The theory is that the delay should have caused the passion to have cooled and the mental impairment resulting from it to have dissipated.<sup>259</sup> And if the defendant kills a victim who is unrelated to the cause of the passion, such as a police officer who properly intervenes, the killing does not qualify for reduction to voluntary manslaughter even though the killing of a victim who caused the passion might have.<sup>260</sup> These limits upon voluntary manslaughter, which are present in many States in one form or another, are generally present in California as in the analogous Texas doctrine,<sup>261</sup> although they are defined in California by varying court interpretations rather than by statute.

The corresponding Texas provision is analogous but more carefully defined by contemporary language in the statute itself.<sup>262</sup> The Texas statute avoids the anomalous California requirement that the killing be committed “without malice,”<sup>263</sup> which is illogical<sup>264</sup> because

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“struggle” precipitated by the advance may suffice); *see also* *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (discussing Maine law construed to allow reduction to manslaughter upon same-sex advance; invalidating Maine’s statutes on other grounds). *See generally* Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959 (2002) (discussing issues related to sexual advanced as bases for manslaughter, including whether the heat of passion doctrine itself ought to be retained).

<sup>259</sup> *Cf.* *State v. Follin*, 263 Kan. 28, 947 P.2d 8 (1997) (rejecting manslaughter upon passage of ten hours as “more time . . . than it would have taken an ordinary person to retain reason”). But the time is said to be flexible, and its treatment varies. *See supra* note 253. Also, past provocation can be revived by a new episode, sometimes even by one that would not suffice by itself. *People v. Berry*, 18 Cal.3d 509, 556 P.2d 777 (1976) (wife’s screaming held sufficient to rekindle passion based on earlier adultery). The kind of “cumulative provocation” recognized in *Berry* complicates the cooling-off analysis.

<sup>260</sup> *See supra* note 254.

<sup>261</sup> *Cf. supra* notes 246, 249, 251-54, 59 (citing Texas and California authorities). *See generally* LEVENSON §§ 5:50-5:51 (discussing California limits).

<sup>262</sup> *See supra* notes 251-54 and accompanying text.

<sup>263</sup> *See supra* notes 246 and accompanying text.

<sup>264</sup> *Cf. Smith v. State*, 83 Ala. 26, 3 So. 551 (1888) (explaining that voluntary manslaughter arises because “passion disturbed the sway of reason,” not because it “stripped the act of killing of the intent to commit it”). If intent is malice, voluntary manslaughter is not “without malice,” because it is intentional. *But cf.* LEVENSON § 5:49 (explaining California doctrine that voluntary manslaughter is “without malice”).

intent supplies malice for murder, and voluntary manslaughter is usually an intentional crime.<sup>265</sup> But this difference probably is not significant in most cases, because the rest of the statute implies what the jury ought to infer: that the defendant's passion negates malice, even though it otherwise would be supplied by intent. Nevertheless, the reference to malice is confusing, and it is better to omit it, as Texas does. Furthermore, Texas includes statutory treatments of sudden passion, adequate cause, the timing element, and the requirement of causation by the victim, in terms that are consistent with the ordinary understandings of these words.<sup>266</sup> The inclusion of the language in the statute itself allows more faithful conformity of verdicts, and of their review, to the legislative intent. The real point, however, is that the approaches of California and Texas are not greatly different.

But there are two more fundamental differences between Texas and California laws governing passion killings. The first is that Texas does not recognize a separate offense of voluntary manslaughter at all. An intentional or knowing killing remains murder, even if committed in the heat of passion arising from an adequate cause.<sup>267</sup> The sentence range simply is reduced without redefinition of the crime.<sup>268</sup> The second is that the defendant, not the prosecution, bears the burden of proving the factors that govern this sentence reduction.<sup>269</sup> The

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<sup>265</sup> It can arise without intent to kill when committed, for example, with intent to cause serious injury or with a depraved heart, because these circumstances also authorize conviction for murder. *Cf.* *United States v. Paul*, 37 F.3d 496 (9<sup>th</sup> cir. 1994) (authorizing manslaughter for unintentional but extremely reckless killing); *see generally* LAFAVE 776 (giving other example). But these mental states are effective to support murder only because they also constitute malice, and therefore to refer to any of these kinds of killings as “without malice,” because committed under heat of passion, seems equally illogical. In any event, intent to kill is so typically the underlying mens rea for voluntary manslaughter that the law of many States assume it as a condition. *Cf.* *People v. Brubaker*, 53 Cal.2d 37, 346 P.2d 8 (1959) (defining the offense as “characterized by . . . an intent to kill”).

<sup>266</sup> *See supra* notes 251-54 and accompanying text.

<sup>267</sup> *Tex. Penal Code* § 19.02(d) (Vernon 2005) (reducing grade of felony to second degree rather than first under heat-of-passion circumstances, even though offense remains murder).

<sup>268</sup> *Id.* §§ 12.32-.33 (defining maxima as life or 99 years for first-degree felonies such as murder without passion and as 20 years for second-degree such as murder with passion findings).

<sup>269</sup> The defendant must “prove[ ] the issue in the affirmative by a preponderance of the evidence.” *Id.*

relevant language is in a subsection of the same section that contains the definition of murder:<sup>270</sup>

(d) At the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is [reduced to] a felony of the second degree.

Some other jurisdictions, such as New York<sup>271</sup> and Maine,<sup>272</sup> also place the burden of proof on the defendant even if they do not eliminate voluntary manslaughter.

Although the issue is debatable, one can argue that the Texas treatment of passion killings, which Texas adopted after rejecting its former separately defined offense of voluntary manslaughter that placed the burden of proof on the prosecution,<sup>273</sup> is superior to that of California. The killing, by definition, is intentional or at least qualifies to support a murder conviction,<sup>274</sup> and the passion-clouded mind that lowers its blameworthiness does not change either this mental state or the nature of the act. The survivors of the homicide, including those close to the victim, deserve a label fitting an unexcused intentional killing. Labeling this kind of killing as murder, even if it arguably is of lesser blameworthiness because of passion, may be a departure from the historical terminology of voluntary manslaughter, but it fits the label better to

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<sup>270</sup> Tex. Penal Code § 19.02(d) (Vernon 2005).

<sup>271</sup> N.Y. Penal Law §§ 125.20, 125.25 (McKinney 1990) (providing that “extreme emotional disturbance” reduces murder to first-degree manslaughter but “need not be proved in any prosecution” for homicide). The United States Supreme Court upheld the resulting placement of the burden upon the defendant in *Patterson v. New York*, 432 U.S. 197 (1977), by treating the reduction as an “affirmative defense” distinct from the elements of murder.

<sup>272</sup> Maine Rev. Stat. Ann. § 2.01(3)-(4) (West 2003) (providing “affirmative defense” to murder upon proof of “extreme anger or extreme fear brought about by adequate provocation,” as defined). An earlier Maine statute had defined malice as an essential element of murder that could be rebutted by the defendant’s proof of heat of passion, but the United States Supreme Court held this earlier statute unconstitutional because it placed on the defendant the burden of disproving an offense element. *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Later, Maine revised its murder statute to eliminate malice as a required element and to substitute “intentionally or knowingly” causing death, and it simultaneously redefined the conditions for reduction to manslaughter as an affirmative defense. Maine thus conformed its law to *Patterson v. New York*, see *supra* note 271, and accomplished the same objective—shifting the burden to the defendant—in a manner approved by the Court.

<sup>273</sup> Acts 1973, 63<sup>rd</sup> Tex. Leg., p. 883, ch. 339, § 1, eff. Jan. 1, 1974 (then codified as Tex. Penal Code § 19.03).

<sup>274</sup> In rare instances it may be unintentional but still exhibits the state of mind required for murder. See *supra* note 265.

the crime. The measure of the sentence inflicted on the defendant is changed, however, so that the objective treatment of the killer reflects the passion, and thus the law arguably reflects relative blameworthiness by confining the consequences for the defendant to a lesser penalty.

Placing the burden of proof upon the defendant can be justified by the observation that this issue of sudden-passion-from-adequate-cause arises only after the prosecution has proved an intentional murder, and it concerns a matter that the prosecution inherently is less likely to be capable of proving beyond a reasonable doubt even if it is true: the precise motivation of the defendant.<sup>275</sup> Often, the defendant is the only one who can offer firsthand evidence of the passion requirements. Given that the jury has found, beyond a reasonable doubt, that the defendant has removed the most obvious other potential witness (by killing the witness), a requirement that the defendant's invocation of sentence reduction should reach a level of probable truth arguably achieves the right balance.<sup>276</sup> In fact, modern commentators have called for the abolition or strict confinement of voluntary manslaughter. These arguments have come from writers of widely different philosophies: from law-enforcement advocates who see the lesser offense as providing a too-easy escape from liability,<sup>277</sup> on the one hand, to feminists who argue, on the other hand, that it operates unfairly toward women.<sup>278</sup> The Texas provision honors the intentions of these

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<sup>275</sup> One ground for classifying a principle defining liability as an affirmative defense is knowledge and control of the relevant information by the defendant. A particular instance concerns the subjective mental state of the defendant, which may be difficult for the opponent to prove. *Cf. Gomez v. Toledo*, 446 U.S. 635 (1980) (holding that good-faith immunity from liability for civil rights violation is an affirmative defense) (civil case).

<sup>276</sup> Other principles of law analogously treat the proof differently if a party has removed witnesses. *Cf. Fed. R. Evid.* 804(b)(6) (providing that the hearsay rule is subject to "forfeiture by wrongdoing" if a party engages or acquiesces in procurement of the unavailability of a witness). The analogy is imperfect, but perhaps the same consideration reinforces the argument for treating the passion issue as an affirmative defense, given that the defendant, by definition, has procured the unavailability of the most knowledgeable other witness, and has done so with a state of mind that otherwise would suffice for murder.

<sup>277</sup> "[P]rovocation law is under attack. . . . [O]ne might expect law and order advocates to criticize a doctrine that can permit an intentional killer to avoid conviction for murder. Joshua Dressler, *supra* note 258, at 960.

<sup>278</sup> *E.g.*, Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133 (1992); CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE COURTROOM* (2003); JEREMY HORDER, *PROVOCATION AND RESPONSIBILITY* 186-97 (1992);

writers by reining in the passion doctrine, but it does so without eliminating a traditional doctrine needed to achieve proper crime grading in the views of other commentators.<sup>279</sup> Again, these conclusions are debatable, and they are not nearly as important as other comparisons that can be made between the statutes of the two States.

In any event, what is more important in this area is that California, like Texas, has managed to avoid the disadvantages of the comparable crime that is defined in the Model Penal Code. Although I believe that the MPC has the superior approach to murder committed purposefully or knowingly, I also think that its definition of voluntary manslaughter is both vague and inconsistent with degrees of blameworthiness. The Model Penal Code provision defines manslaughter to include a criminal homicide that would otherwise be murder when it is committed under the influence of “extreme mental or emotional disturbance for which there is reasonable explanation or excuse.”<sup>280</sup> Even if this provision reads sensibly, it becomes indeterminate and results in excusing serious homicides from being treated properly as murders, when applied to real cases. The MPC formula provides “a new, far broader version of the [provocation] defense” when contrasted to the “narrow” original concept.<sup>281</sup> Nevertheless, the MPC formulation unfortunately has been adopted in some States, such as Kentucky<sup>282</sup> and New

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Emily L. Miller, *Womanslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665, 667-78 (2001); Adrian Howe, *More Folk Provoke Their Own Demise (Homophobic Violence and Sexed Excuses)—Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defense*, 19 SYDNEY L. REV. 336 (1997); Victor Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997).

<sup>279</sup> E.g., Dressler, *supra* note 258. See also *infra* authorities cited in note 287.

<sup>280</sup> American Law Institute, Model Penal Code § 210.3(b) (1962). The MPC version also expands the scope of the manslaughter reduction by providing, “The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation as he perceives them to be.” The objective requirement of a “reasonable” explanation or excuse thus is diluted by a purely subjective element.

<sup>281</sup> Dressler, *supra* note 258, at 961.

<sup>282</sup> Ky. Rev. Stat. 507.020(1)(a)(Baldwin 2003). See *Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky. 2004).

The Kentucky statutes seriously blur the distinction between manslaughter and murder. Compare *Turner v. Commonwealth*, 153 S.W.3d 823 (Ky. 2005) (reversing “wanton murder” conviction by 4-3 vote) with *Id.* at 833-35

York.<sup>283</sup>

As an example of the dysfunction inherent in the MPC criterion for passion-type manslaughter, consider the crime of Sirhan Sirhan, who was convicted in California of murder for killing Senator Robert Kennedy, the brother of President John F. Kennedy and a leading Presidential candidate in his own right.<sup>284</sup> Sirhan claimed that he was provoked to commit the crime because Senator Kennedy, during his Presidential campaign, had refused to support the Palestinian cause in the Middle East. As a child, Sirhan had seen and experienced firsthand the deprivations suffered by Palestinians and the conditions they endured in refugee camps.<sup>285</sup> If the Model Penal Code provision were applicable, the defense could argue persuasively that Sirhan's mental state exhibited "extreme emotional disturbance" arising from a "reasonable" cause, and the prosecution presumably would have the burden of disproving this claim by proof beyond a reasonable doubt.<sup>286</sup> The prosecution's burden would be inherently difficult to carry because of the vagueness in the concepts of "extreme" disturbance and "reasonable" explanation. Furthermore, even if the prosecution could have succeeded in proving that Sirhan was not emotionally disturbed by a long past event in his life that was at some point a reasonable explanation for passion, it seems anomalous to consider lowering the grade of the offense for these reasons. The victim was engaged in the political process in a way unrelated to the killer,

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(dissenting opinion of Justice Graves, pointing out that wanton murder in Kentucky "requires wanton conduct with respect to both the act and the circumstances, manifesting an extreme indifference to human life," whereas "wanton conduct resulting in homicide" without extreme indifference to human life is only manslaughter).

<sup>283</sup> N.Y. Penal Law §§ 125.20, 125.25 (McKinney 1990). New York avoids some excessive breadth by placing the burden of proof on the defendant. *See supra* note 271 and accompanying text.

<sup>284</sup> *See People v. Sirhan*, 497 P.2d 1121, 1125 (Cal. 1972).

<sup>285</sup> *Id.* at 1127.

<sup>286</sup> *See supra* note 280 and accompanying text. Actually, there could be some doubt that the traditional formulation, in California, completely avoids the effect of the MPC in cases such as Sirhan's. For example, so-called "cultural issues" may be applicable in California, although this conclusion is unclear. *See People v. Wu*, 235 Cal.App.3d 614 (1991) (retroactively ordered unpublished). Even if so, however, the unlikelihood of extreme provocation in an

the triggering cause was of a kind experienced by many people who are not tempted to kill, the occurrence had influenced Sirhan only in the remote past, and it seems unlikely that ordinary or average people would similarly be rendered incapable of cool reflection. By instead retaining common law limits on the availability of voluntary manslaughter, California has prevented this kind of result.

It should be added that recent years have seen a wide variety of proposals for redefinition of the passion or provocation concept. Some of these proposals are thoughtful and merit consideration.<sup>287</sup> They are beyond the scope of this article, however, because my objective is to compare existing formulations and to do so on a broad front, and this goal cannot be achieved in that way.

## ***B. Involuntary Manslaughter: “Without Due Cause or Circumspection”***

### **1. Is the Crime Really Equivalent to Negligent Homicide?**

The general definition in California of the crime of involuntary manslaughter provides that this offense consists of an unlawful killing, “without malice,” by an “act which might produce death,” committed “without due caution and circumspection.”<sup>288</sup> As in the case of

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“ordinary” person, even with cultural factors considered, would seem to preclude the defense, and the cooling-off factor would, also.

<sup>287</sup> Within the year 2005 alone, consider Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFFALO CRIM. L. REV. 385 (2005) (proposing doctrine comparing fault of parties); Stephen P. Garvey, 90 IOWA L. REV. 1677 (2005) (proposing solution based on “akrasia” theory, which distinguishes those who act in defiance of the law from those who act in a moment of culpable ignorance or weakness of will); and Deborah W. Denno, *Criminal Law in a Post-Freudian World*, 205 U. ILL. L. REV. 601 (proposing modern psychological approaches to conscious will as a replacement for Freudian psychology emphasizing the unconscious, which assertedly was dominant in the 1950’s and 1960’s and therefore framed key concepts of the Model Penal Code). See also Joshua Dressler, *supra* note 258 (proposing a provocation defense “based on a partial excuse theory, separate from the diminished capacity doctrine,” not requiring a criminal act as provocation but enabling “any actions or words” potentially to qualify, “navigat[ing] a fine line between subjectivism and objectivism”).

<sup>288</sup> Cal. Penal Code § 192(b) (West 2005). This statute also retains the so-called “misdemeanor manslaughter rule,” in a provision that covers killing “in the commission of an unlawful act, not amounting to felony.” See LEVENSON § 5:54 (discussing California’s misdemeanor-manslaughter rule). There also are a third and possibly a fourth variation of this crime. *Id.* In addition, California defines five different types of vehicular manslaughter. *Id.* § 5:55.



voluntary manslaughter, the requirement that the crime be committed “without malice” serves only to confuse the issue.<sup>289</sup> The phrase, “without due care and circumspection,” seems to suggest that the mens rea is mere negligence—and simple negligence at that,<sup>290</sup> of the kind that would suffice to support a money judgment in a civil case. The case law provides otherwise, requiring a mens rea roughly corresponding to that of gross negligence<sup>291</sup> under the Model Penal Code.<sup>292</sup> This definition closely parallels the provision for the analogous crime of criminally negligent homicide under the MPC, which consists of a killing with “criminal negligence,” defined as a “gross deviation” from ordinary standards of care.<sup>293</sup> Involuntary manslaughter in California carries “2, 3, or 4 years” imprisonment, while the similar crime of negligent homicide in Texas carries “not more than two years or less than 180 days” in a state jail.<sup>294</sup>

Given this comparison of the two States’ laws, and considering earlier parts of this article, we can construct a chart showing the general hierarchy of homicidal offenses in each. This chart will facilitate an analysis of overlaps and gaps in the two sets of laws. Thus, murder

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These complex doctrines are beyond the scope of this article except for the observation that they would be unnecessary in a State with a better constructed homicide jurisprudence.

<sup>289</sup> See *supra* notes 263-64 and accompanying text.

<sup>290</sup> See LAFAVE 264-67 (distinguishing ordinary negligence from gross negligence and from recklessness); LEVENSON § 5:54 (defining California’s criminal negligence).

<sup>291</sup> The negligence must be “criminal” negligence, meaning that it involves “something more” than ordinary negligence. It “must be aggravated, culpable, gross, or reckless [and] such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances . . . .” *People v. Penny*, 44 Cal.2d 861, 869, 876-80 (1955); *accord*, *People v. Bennett*, 54 Cal.3d 1032, 1036 (1991); *People v. Ochoa*, 6 Cal.4<sup>th</sup> 1199, 1204 (1993). The test “is objective: whether a reasonable person in the defendant’s position would have been aware of the risk involved.” *People v. Valdez*, 27 Cal.4<sup>th</sup> 778, 783 (2002). For a case involving jury instructions, see *People v. Gilbert*, 2004 WL 2416833 at 4 (Cal. App.) (unpublished opinion). See also LEVENSON § 5:54 (defining criminal negligence in California).

<sup>292</sup> American Law Institute, Model Penal Code § 2.02(2)(d) (1962).

<sup>293</sup> Tex. Penal Code § 19.05 (Vernon 2005). See also *Id.* § 6.02 (defining criminal negligence in terms of gross deviation).

<sup>294</sup> Cal. Penal Code § 193 (West 2005); Tex. Penal Code § 12.35 (Vernon 2005). The sentence in Texas is enhanced to that of a third degree felony (two to ten years) upon proof of exhibition of a deadly weapon or conviction for any of certain felonies. *Id.*

in Texas corresponds to both first-degree and second-degree murder in California.<sup>295</sup> Manslaughter in Texas, however, also corresponds roughly to California-style murder of the “abandoned and malignant heart” variety, at least if the heart is sufficiently “abandoned” to imply malice.<sup>296</sup> No crime in California clearly corresponds to the lesser mens rea of conscious indifference that is not sufficiently “abandoned” for murder, although the law on this point currently is confused.<sup>297</sup> Texas would call this crime manslaughter.<sup>298</sup> Negligent homicide in Texas corresponds roughly to involuntary manslaughter in California.<sup>299</sup> Finally, voluntary manslaughter in California is analogous to murder-with-sentence-reduction in Texas.<sup>300</sup> Put together, the comparison looks like the chart below.<sup>301</sup>

Defining Characteristics	California Crime	Sentence Range (yr)	Texas Crime	Sentence Range (yr)
Premeditation	First-degree murder	25 minimum	Murder*	5 to 99
Intent-type malice	Second-degree murder	15 minimum		2 to 20
Passion killing**	Voluntary manslaughter	3, 6, or 11		
Conscious indifference amounting to abandoned-heart malice	Second-degree murder	15 minimum	Manslaughter	2 to 20
Conscious indifference amounting to recklessness***	Involuntary manslaughter	2, 3, or 4		
Gross negligence			Criminally negligent homicide	½ to 2
* Texas murder also includes knowledge, as well as intent to cause serious bodily injury coupled with an act clearly dangerous to life. Both States define certain felony-murders.				

<sup>295</sup> See *supra* Pt. I of this article.

<sup>296</sup> See *supra* Pt. IIB of this article.

<sup>297</sup> See *supra* Pt. IIB of this article. See also *supra* notes 235-39 (discussing confusion and noting California Supreme Court’s recent grant of review).

<sup>298</sup> See *supra* notes 240-42 and accompanying text.

<sup>299</sup> See *supra* notes 290-93 and accompanying text.

<sup>300</sup> See *supra* notes 243-45.

<sup>301</sup> It should be remembered that a chart of this kind must contain ambiguities that cannot be clearly labeled. For example, the line between second-degree murder and involuntary manslaughter in California is indeterminate. The drawing of any line conceals this ambiguity, although the line must be drawn somewhere to make the chart meaningful. For an overview of the California homicide law, see LEVENSON § 5:1 (briefly summarizing all grades of homicidal offenses).

\*\* If the passion fits the statutory criteria in each State.  
 \*\*\* For recklessness involving conscious indifference but not amounting to abandoned-heart malice, California defines no separate crime, although this mental state would suffice for involuntary manslaughter. California also includes misdemeanor-manslaughter. Both States define certain vehicular homicides as crimes.

The chart reinforces several conclusions that this article already has reached. For example, it shows graphically the splintering caused by California's degrees of murder,<sup>302</sup> the murder-manslaughter confusion created by the abandoned-heart metaphor,<sup>303</sup> the correspondence of murder-with-sentence-reduction to voluntary manslaughter,<sup>304</sup> and the contrasting simplicity resulting from the Model Penal Code's unitary, comprehensive grade of murder.<sup>305</sup> But the chart also shows something about lesser grades of homicide. California does not define any grade of crime, lesser than murder, corresponding to conscious indifference of the reckless variety.<sup>306</sup> Model Penal Code States, such as Texas, define murder when the defendant's mental state is intent or knowledge, manslaughter when it is recklessness (involving actual awareness of the danger of death), and criminally negligent homicide when it is gross negligence.<sup>307</sup> This system produces a relatively smooth and continuous series of gradations roughly proportional to relative degrees of blameworthiness. California, however, following the Pennsylvania pattern, defines no distinct crime of reckless homicide.<sup>308</sup> Instead, California categorizes the crime as murder if the recklessness is extreme enough to qualify as abandoned-heart malice,<sup>309</sup> but only as

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<sup>302</sup> See *supra* Pt. I of this article.

<sup>303</sup> See *supra* Pt. IIB of this article.

<sup>304</sup> See *supra* Pt. IIIA of this article.

<sup>305</sup> See *supra* Pts. ID, IIIA of this article.

<sup>306</sup> At least, it does not do so in terms corresponding to the Model Penal Code definition, unless the recklessness is so extreme as to supply malice. See *infra* notes 312-13 and accompanying text.

<sup>307</sup> See American Law Institute, Model Penal Code §§ 210.2-210.4 (1962); Tex. Penal Code §§ 19.02, 19.04-19.05 (Vernon 2005).

<sup>308</sup> See *supra* note 306.

<sup>309</sup> See *supra* Pt. IIB of this article.

involuntary manslaughter if it is of a lesser degree amounting to gross negligence.<sup>310</sup> This sharp falloff—all the way from murder to a relatively minor offense defined only by gross negligence, with no offense in between these two extremes—leaves a concealed gap in the Pennsylvania pattern of homicide.

This gap, in fact, may explain the anomalous results in California’s dog-mauling cases. In *People v. Berry*,<sup>311</sup> for example, where the defendant caused the brutal death of a two-year old by setting up a dog bred for killing to guard his marijuana plants, he did not act with mere negligence. Even “criminal” negligence, defined to require a “substantial and unjustified risk” and a “gross deviation” from ordinary conduct, seems inadequate to describe his culpability. Negligence and criminal negligence in *Berry* both depend on objective standards, and they can be made out by foolish inadvertence.<sup>312</sup> The crime in *Berry* was not one of inadvertence. Instead, Berry acted with full subjective awareness of the risk he created, while knowing the substantial and unjustified quantum of that risk. This kind of recklessness is distinct and more culpable than criminal negligence exhibited by inadvertence.<sup>313</sup> But States such as California, under the Pennsylvania pattern, do not recognize recklessness in the form of subjective awareness, or actual knowledge of a substantial and unjustified risk, as a mental state separate from gross negligence, unless the mens rea is so extreme that it supplies the malice for murder.<sup>314</sup>

It is natural in cases of this kind for a prosecutor to seek a charge more serious than negligence. Since murder is the next rung on the ladder in California, and since depraved-heart

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<sup>310</sup> See *supra* note 291 and accompanying text. See also LEVENSON § 5:1 (providing an overview of California homicide).

<sup>311</sup> See *supra* notes 229-34 and accompanying text.

<sup>312</sup> See *supra* note 291.

<sup>313</sup> This is the Model Penal Code form of recklessness. See *supra* notes 226-27 and accompanying text.

<sup>314</sup> See *supra* Pt. IIB of this article.

malice leaves room for it, a prosecutor's natural instinct will lead to a stretch for that next rung, however ill-fitting the label of murder may appear in such a case. It is understandable, then, for a trial judge to read the law as permitting this stretch, and it is equally understandable for a court of appeals, seeing no middle alternative to reduction to a mere negligence crime, to approve the stretch to murder as the appellate judges did in *Berry*.<sup>315</sup> And then, it is at least forgivable, even if not commendable, for a higher court to do what the California Supreme Court did in *Berry*: to deny review, leaving the reinstatement of the murder indictment in place, but at the same time to order the appellate court's reasoning retroactively unpublished, so that the law is left completely opaque.<sup>316</sup> Then, finally, it is predictable that a jury given binding legal instructions and a reasonable-doubt standard will produce only a negligence verdict, which then must be reviewed on appeal under ambiguous doctrine—again, as happened in *Berry*.<sup>317</sup>

It should be added that this murder-skip-to-negligence gap is a practical, real-world effect, not a theoretical one. It is not apparent from the face of the California statutes. In theory, there is no gap; an unlawful homicide is either murder or manslaughter, and it is murder if the defendant is subjectively aware and manslaughter otherwise. But the world is rarely so precise in fitting theory, and a factfinder subject to a reasonable doubt standard is likely to balk at convicting a defendant for murder when there is neither intent nor knowledge, as in *Berry*. Hence, the practical effect is that very serious homicides (which describes *Berry* even in the absence of intent or knowledge) are shoved down to the level of mere negligence, an outcome that depreciates their blameworthiness. Again, this effect is not an intended or theoretical result in California, but it is real nonetheless. It results from the absence of a separate crime below

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<sup>315</sup> *Berry v. Superior Court*, 256 Cal. Rptr. 344 (1989) (ordered not published; previously published at 208 Cal.App.3d 783).

<sup>316</sup> See *supra* notes 231-33 and accompanying text.

<sup>317</sup> *People v. Berry*, 1 Cal. App.4<sup>th</sup> 778, 2 Cal. Rptr. 416 (1991).

murder but above mere negligence, that a crime might cover cases such as *Berry*, such as the subjective-awareness reckless manslaughter offense in Texas.

Earlier, this article critiqued the Pennsylvania pattern's definition of depraved-heart murder in connection with *Berry*.<sup>318</sup> The present discussion adds another criticism, centering on the discontinuity produced when the law creates no alternative below murder except criminal negligence. A conscious-indifference crime as a lesser-included offense makes sense in light of the results illustrated by *Berry*. There may be an understandable historical reason for the failure of Pennsylvania-pattern States to define such a homicidal crime, since the conscious indifference or similar mental state required for abandoned-heart murder would remain confusingly similar to the conscious indifference required for recklessness.<sup>319</sup> Lawmakers conceivably could distinguish malice-type conscious indifference by some sort of pejorative label such as "extreme," but that adjective seems an illogical qualifier for a categorical mental state such as conscious indifference.<sup>320</sup> This term, quite properly, is useful precisely to convey an either-it-is-or-it isn't condition: knowledge or awareness that the defendant either does or does not possess, with degrees such as "extreme" consciousness seeming anomalous. Thus, it is understandable that the Pennsylvania pattern leads to the absence of an intermediate crime. At the same time, however, the failure to include that intermediate crime produces a gap that prevents proportional crime grading. Under the Model Penal Code, the gap disappears: manslaughter covers the conscious-indifference case (recklessness), while criminally negligent homicide covers inadvertence (gross-deviation negligence).

## **2. Vagueness in the Definition of Involuntary Manslaughter**

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<sup>318</sup> See *supra* notes 229-41 and accompanying text.

<sup>319</sup> See *supra* Pt. IIB of this article.

<sup>320</sup> Some jurisdictions do use this term in similar ways, however, including the Model Penal Code. See *supra* notes 380-83 and accompanying text.

Aside from this coverage discontinuity, the definition of lesser included offenses under the Pennsylvania pattern sometimes produces unnecessary vagueness. One disadvantage of the California jurisprudence, for example, is that the jury should be given the statutory definition, including the “without due care and circumspection” provision, which implies that ordinary negligence suffices and therefore conflicts with the higher requirement, tantamount to gross negligence, imposed by the case law. This problem parallels the issues raised by the malice aforethought criterion discussed in a previous section of this article.<sup>321</sup> It probably is not a source of injustice if the jury is successfully educated about the contradiction and inculcated with the true meaning of the crime, but it still remains a source of unnecessary confusion that requires attention and may divert the jury from other issues—as well as a potential source of erroneous conviction, in those cases in which the jury might remain confused. And this confusion, again, cumulates with other contradictions, such as those created by instant premeditation and the misnomer of malice aforethought.

Another problem arises from confusion in the judicial redefinition of the statutory formula. As sometimes happens when the legislative language is so ill-fitting that it must be interpreted extensively,<sup>322</sup> the California courts have produced inconsistent and varying translations of the “without due care and circumspection” requirement for involuntary manslaughter. The prevailing definitions emphasize that the standard is objective, so that an inadvertent defendant, who is unaware of or has forgotten the risk, can still be guilty of the crime

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<sup>321</sup> See *supra* notes 199-204 and accompanying text.

<sup>322</sup> “[O]ur law recognizes that ordinary negligence is a common occurrence in human affairs, and that even when such commonplace heedlessness proves lethal, its criminalization would be undesirable for a number of reasons including fairness, social utility, and the hazards of granting excessive discretion to prosecuting authorities to capriciously punish where there is little if any ground for moral blame or social opprobrium.” *People v. Gilbert*, 2004 WL 2416533 at 3 (Cal. App.) (unpublished opinion). Thus, the statutory language, “without due care,” furnishes an inadequate standard.

if this inadvertence results in conduct that is a gross deviation from that of an ordinary person.<sup>323</sup> In other words, “pure heart, empty head”<sup>324</sup> does not avoid criminal liability. But there are some decisions that seem to suggest otherwise, implying instead that actual awareness of the risk is required.<sup>325</sup> Furthermore, the California cases use so many different terms to define the mens rea for involuntary manslaughter, each with different connotations, that confusion seems inevitable.<sup>326</sup>

The following passage from a recent unpublished opinion in a case called *People v. Gilbert* shows a prototypical treatment of the issue:<sup>327</sup>

The phrase " 'without due caution and circumspection' " means that the defendant's conduct must be *criminally negligent*. The Penal Code defines "negligence" using a variation of the familiar concept of lack of due care, i.e., "a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns." However, *criminal* negligence sufficient to establish manslaughter requires "something more" than the "mere negligence" or "ordinary negligence" that leads to civil liability. " 'The negligence must be aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences.' . . . 'Aside from the facts that a more culpable degree of negligence is required in order to establish a criminal homicide than is required in a civil action for damages and that contributory negligence is not a defense, criminal responsibility for a negligent homicide is ordinarily to be determined pursuant to the general principles of negligence, the fundamental of which is *knowledge, actual or imputed, that the act of the slayer tended to endanger life.*' "

Thus, to support a conviction of involuntary manslaughter the defendant's conduct must rise at least to the level of *gross* negligence, which is defined as "the

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<sup>323</sup> See *infra* note 327 and accompanying text.

<sup>324</sup> This phrase has been used to describe attorney negligence for purposes of sanctions under Fed. R. Civ. P. 11. A signer of a pleading, it is said, cannot avoid sanctions “by operating under the guise of a pure heart and an empty head.” *Zuniga v. United Can Co.*, 812 F.2d 443, 452 (9<sup>th</sup> Cir. 1987).

<sup>325</sup> See *infra* note 327 and accompanying text.

<sup>326</sup> See *infra* note 327 and accompanying text.

<sup>327</sup> 2004 WL 2416533 at 2-3 (unpublished opinion) (citations omitted). Most of the recent opinions are unpublished. See *infra* notes 328-36 and accompanying text.



exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences. 'The state of mind of a person who acts with conscious indifference to the consequences is simply, "I don't care what happens." ' "

. . . "[C]riminal negligence must be evaluated objectively. . . . The relevant inquiry . . . turns not on defendant's subjective intent . . . but on the objective reasonableness of her course of conduct." " 'The test is objective: whether a reasonable person in the defendant's position would have been aware of the risk involved'." . . .

The reference in this passage to “conscious indifference” indicate that actual awareness, or in other words, subjective knowledge, is required. This position is supported by authority.<sup>328</sup> But the reference to “objective reasonableness” indicates, on the contrary, that “subjective intent” is not required. This contrary position also is supported by authority.<sup>329</sup> The references to both ordinary and gross negligence are inconsistent, even though a reader might conclude that the passage calls for gross negligence by reading it carefully as a whole. Terms such as “aggravated, culpable, gross, or reckless,” although they all have been used to describe criminal negligence,<sup>330</sup> produce different meanings; in a sense, even ordinary negligence is “culpable,” even though it is not “aggravated.”

The same case, *Gilbert*, demonstrates the kinds of arguments that result from this confusion. The defendant had left his son, Kyle, in his automobile, where Kyle died of hypothermia. Defendant contended “that he [could not] be guilty of criminal negligence because he forgot that Kyle was locked in the car.” In other words, “without an actual present knowledge

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<sup>328</sup> *E.g.*, *People v. Bennett*, 54 Cal.3d 1032, 1036 (1991); *People v. Ochoa*, 6 Cal.4<sup>th</sup> 1199, 1204 (1993).

<sup>329</sup> *E.g.*, *Walker v. Superior Court*, 47 Cal.3d 112 (1988); *People v. Valdez*, 27 Cal.4<sup>th</sup> 776, 783 (2002).

It should be added that the distinction between recklessness (which requires actual, subjective awareness of the risk) and criminal negligence (which does not, but rather can be supplied by mere inadvertence) is inherently confusing. Undoubtedly, Texas juries must have difficulty with the distinction too. But the confusion is reduced in Texas in that the two terms, recklessness and criminal negligence, are used separately and distinctly, and the difference is explained precisely. In summary, the confusion cannot be dispelled perfectly in the real world, but it can be reduced.

<sup>330</sup> *People v. Penny*, 44 Cal.2d 861, 879-80 (1955).

that Kyle was in the car, he could not be charged with knowledge that Kyle was at risk.”<sup>331</sup> The court rejected this argument as “incompatible with the principles we have just recited.” The “governing question,” it held, is “the objective reasonableness of [defendant’s] course of conduct.” This standard depended not only upon circumstances “of which the defendant is presently, actively aware,” but also upon “all of the circumstances of which a reasonable person would be aware.”<sup>332</sup> Having thus founded its decision on an objective standard, however, the court went on to confuse the matter by injecting a subjective standard. Gilbert’s conduct, it said, reflected a “conscious disregard of the lethal risk he had created,” and “[n]othing more was required to sustain a finding of guilt.”<sup>333</sup> A “conscious disregard” requires an awareness (consciousness) of the risks that the defendant disregards, and this passage is flatly inconsistent with other parts of the opinion saying that awareness is not required.

This confusion carries over into jury instructions. “Routine” charges in involuntary manslaughter cases include the statement that, for criminal negligence, “it must . . . appear that death was not the result if inattention, mistake in judgment[,] or misadventure[,] but the natural and probable cause of [an] aggravated[,] reckless[,] or grossly negligent act.”<sup>334</sup> This instruction conflicts directly with the *Gilbert* holding, which enables “inattention” or “mistake” to be sufficient, and it also creates confusion when combined with instructions embodying an objective negligence standard.<sup>335</sup> The *Gilbert* jury also was instructed that “[m]ere inattention, forgetfulness, mistake in judgment, or misadventure . . . is not criminal *unless the quality of the act makes it so.*” Understandably, the jury sent an inquiry during deliberations asking about the

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<sup>331</sup> People v. Gilbert, 2004 WL 2416533 at 3 (Cal. App.).

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* at 4, citing CALJIC 3.36.

<sup>334</sup> 2004 WL 2416533 at 4.

<sup>335</sup> *Id.*

meaning of the cryptic phrase, “unless the quality of the act makes it so.”<sup>336</sup> This key language provided the exception that allowed conviction.

Again, the presence of large proportions of unpublished cases suggests that this kind of confusion produces appeals that would otherwise be unnecessary.<sup>337</sup> A Lexis search showed that nine of the ten most recent cases on point are unpublished and uncitable.<sup>338</sup> Juries, lawyers, and courts probably would understand the standard better if the Model Penal Code formulation were used. Ideally, this solution would be accomplished by legislation such as that in Texas, enacting both a more serious offense characterized by actual knowledge of the risk (manslaughter) and a lesser offense requiring only conduct that is grossly negligent by objective standards (negligent homicide). Short of this kind of legislation, however, the California courts should follow the example of the Model Penal Code at least to an extent that avoids confusing the proper objective standard with subjective formulations such as “conscious indifference.”

#### **IV. FELONY MURDER: STATUTORY DEFINITION VERSUS COMMON LAW EVOLUTION**

The felony murder rule, stated simplistically, defines as murder a killing caused by a defendant in the course of committing a felony, even if the mens rea for murder would otherwise be absent.<sup>339</sup> At common law, a rough definition probably sufficed, because not only murder but

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<sup>336</sup> *Id.* The judge replied, “‘[T]he quality of the act’ refers to the nature or character of the act or conduct including all of the facts and circumstances surrounding the act or conduct in light of the instructions.” This highly abstract instruction seems less helpful than one that would have defined guilt in terms of gross negligence or referred to the existing instructions that did so.

<sup>337</sup> *Cf. supra* notes 148-49 (suggesting that large numbers of recent unpublished cases applying the premeditation-deliberation formula to sufficiency and instruction issues means that appellate lawyers are being forced to raise issues with little actual merit but of such ambiguity that omission may result in accusations of ineffectiveness).

<sup>338</sup> The search inquiry was “INVOLUNTARY MANSLAUGHTER” & “PEOPLE V. PENNY.” The latter is a seminal decision on the subject that virtually uniformly appears in cases depending upon sufficiency or instructions.

<sup>339</sup> *Cf. LAFAVE* 744 (defining the concept in terms of “an unintended death during commission or attempt”); *LEVENSON* § 5:33 (defining second-degree felony murder as “homicide that occurs during the perpetration of a felony that is not listed among the felonies that can support a conviction of first-degree murder”).

other felonies as well were punishable by death, and therefore the details did not matter as much as they do today.<sup>340</sup> Contemporary jurisprudence seeks to limit the felony murder doctrine, however, because it might disconnect results from blameworthiness if applied to the outer edges of this rough definition.<sup>341</sup> Jurisdictions differ primarily in the doctrines that they use for limiting the felony murder rule.<sup>342</sup>

Some scholars who criticize the felony murder rule conclude that there is little in the way of policy that supports it.<sup>343</sup> The most frequent attacks against the doctrine are that it allegedly creates a crime that does not correspond to the defendant's individual blameworthiness, that it is artificial and formal, and that it cannot serve its supposed purposes.<sup>344</sup> These criticisms are useful for evaluating different formulations of felony murder, even in jurisdictions that do not abolish it. In other writing elsewhere, I have argued that the felony murder rule does serve important purposes and that the limits that differing States have imposed upon it are consistent with those purposes, because they prevent the rule from applying to cases in which it does not serve its function.<sup>345</sup> The policies underlying the felony murder rule, as I have explained them, are that it contributes to rational classification and proportional grading of homicides, because actus reus,

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Thus, California also recognizes a separate category of "first-degree felony murder." The reader will recall that California creates a number of situation-specific first-degree murder definitions, including murders committed during "arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any other act punishable under [certain other statutes]." This provision has the effect of dispensing with any requirement of premeditation or deliberation as well as all other mental-state requirements except those required for the underlying felonies, and also of elevating the crime to first-degree murder. See LEVENSON § 5:17 (explaining this doctrine).

<sup>340</sup> See LAFAVE 744 at n.5.

<sup>341</sup> See David Crump & Susan Waite Crump, In Defense of the Felony Murder Doctrine, 8 HARV. J. L. & PUB. POL'Y 359, 377 (1985) (hereinafter cited as Crump, *Felony Murder*).

<sup>342</sup> Cf. Crump, *Felony Murder* 360, 377 (indicating that most States retain the doctrine, but there are many different limiting doctrines).

<sup>343</sup> E.g., Model Penal Code § 210.2 Comment (Official Draft & Revised Comments 1980) (concluding that "[p]rincipled argument in favor of the felony-murder doctrine is hard to find"); Nelson E. Roth & Scott E. Sundby, The Felony-Murder Rule: A Doctrine at Constitutional Crossroads, 70 CORNELL L. REV. 446 (1985).

<sup>344</sup> See, e.g., authorities cited in *supra* note 343.

as well as mens rea, is relevant to blameworthiness;<sup>346</sup> that it serves the function of condemnation, by reaffirming the sanctity of human life;<sup>347</sup> that it serves a deterrent function;<sup>348</sup> that it enhances the clarity of crime definition and sentencing consequences that flow from crimes;<sup>349</sup> that it contributes to the proper allocation of scarce criminal justice resources;<sup>350</sup> and that it minimizes the utility of perjury.<sup>351</sup> Here, I shall not repetitively develop the arguments supporting these purposes or the contrary arguments, although that is a matter for continuing debate and could be the subject of a complete article by itself.<sup>352</sup> Instead, this article will use

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<sup>345</sup> See Crump, *Felony Murder* 361-76 (describing policies that the rule arguably serves); 377-96 (analyzing the limiting doctrines).

<sup>346</sup> “Differences in result must be taken into account as part of actus reus . . . . For example, murder and attempted murder may require similar mental states . . . . The only difference justifying [more severe treatment of murder] is that death results in one but not in the other.” Thus, “the felony murder doctrine reflects the conclusion that a robbery that causes death is more closely akin to robbery than to murder.” Crump, *Felony Murder* 362-63.

<sup>347</sup> “[C]haracterizing a robbery-homicide solely as robbery would have the undesirable effect of communicating to the citizenry that the law does not consider a crime that takes a human life to be different from one that does not . . . . [.] a devaluation of human life.” *Id.* at 368.

<sup>348</sup> “[T]he argument that felons may be ignorant of [the felony murder doctrine] is unduly categorical . . . . [T]he general population, including felons, is provably more aware of the outlines of the felony murder doctrine than of many others, more common criminal concepts . . . .” Also, “[t]he proposition that accidental killings cannot be deterred is inconsistent with the widespread belief that the penalizing of negligence, and even the imposition of strict liability, may have deterrent consequences.” *Id.* at 370-71.

<sup>349</sup> “[W]hen the offense is spontaneous, occupies only a brief time span, and is dependent upon mental impulses evidenced only by the defendant’s actions, such terms as premeditation, deliberation, malice, or even ‘intent’ leave jurors with a difficult judgment. [This ambiguity] produces disparity in verdicts [and] a perception of discrimination.” These effects “are reduced by the felony murder doctrine.” *Id.* at 372.

<sup>350</sup> “[No] less a tribunal than the California Supreme Court has stated this rationale [i.e., that a felon is less entitled to ‘fine judicial calibration.’]” Adjudication of the ambiguous mens rea issue in this situation “would use judicial resources that could be used elsewhere, in ways that might be more likely to improve the quality of justice.” *Id.* at 375.

<sup>351</sup> “The denial of harmful intent in such a situation is too facile. . . . The law itself is brought into disrepute when it is defined so that perjury is frequent. Jurors might be inclined to lose respect for the criminal justice system even as they acquit the defendant on his ambiguous claim of accident, which they disbelieve but cannot reject beyond a reasonable doubt.” *Id.* at 376.

<sup>352</sup> Thus, many of the articles that cite Crump, *Felony Murder* deviate from the pre-existing scholarship by asserting that valid purposes are served by the felony murder doctrine. E.g., Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1595 & n.192 (2005) (describing Crump article as “excellent and fascinating”); Mitchell Keiter, *With Malice Toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law*, 38 U.S.F. L. REV. 261, 273 & n.36 (2004) (supporting deterrence rationale); Sean J. Kealy, *Hunting the Dragon: Reforming the Massachusetts Murder Statute*, 10 B.U. PUB. INT. L.J. 203, 240 & n.279 (2001) (describing as “[m]ost persuasive” the argument that “the rule offers a rational, purposeful grading of offenses). Still, “huge disagreement” exists over *mens rea* for homicide and over the theories set out in Crump, *Felony Murder*. Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 168 & n.115 (2005). For continuing condemnation of the rule, see Sara Sun Beale, *What’s Law Got to Do with It?*:

these policies—those identified by both critics and supporters of the rule—as the basis for comparing the Texas and California versions of felony murder, on the assumption that, since most jurisdictions have retained the felony murder doctrine, the issue whether to retain the rule is separate from the question whether one formulation is superior to another.

The California felony murder doctrine is not expressed in the statutes. The relevant language simply defines murder as a killing with “malice aforethought,” and because that term derives from the common law, and because the common law included the felony murder rule as an aspect of implied malice,<sup>353</sup> the California courts initially retained and applied a court-defined version of the rule. The California Supreme Court later held, however, that “malice is not an element . . . under the felony-murder doctrine,” and that the rule in that State arose instead by more general implication from the legislative history of the murder statute.<sup>354</sup> In fact, *People v. Dillon*,<sup>355</sup> which announces this holding, is emblematic of the uncertainty in the California statutes that is created by a history of what can only be called sloppy legislation. The

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*Influencing the Development of (Federal) Criminal Law, The Political, Social, Psychological and Other Non-Legal Factors*, 1 BUFF. CRIM. L. REV. 23, 45 (1995) (arguing that the rule “has received nearly universal scholarly criticism” and suggesting that it may be retained because of public attitudes at variance with those of “experts”(!)—statements that no longer are accurate and that apparently assume that the rule’s detractors have “expertise” that its scholarly supporters do not); James J. Tomkovich, *The Endurance of the Felony Murder Rule: A Study of the Forces That Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429 (1994) (stating that “praise” for the felony murder rule would be “disingenuous,” even though to “bury” it would be “impossible”); Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 1994 J. COMPTEMP. LEGAL ISS. 237, 280 & n.107 (classifying felony murder among “unfair doctrines” because although results matter, “they don’t matter that much or in that way,” at least in Professor Moore’s view, although others may conclude that “they do”).

<sup>353</sup> Cal. Penal Code § 187 (West 2005). The court initially applied various descriptors to the relationship between the concepts, including that felony murder “presumes” malice, or “ascribes,” “posit[s],” or results in an “imputation” or “implication” of malice. See *People v. Dillon*, 668 P.2d 697, 715 & n.20 (Cal. 19 ). In *Dillon*, however, the court traced the history of the statute and doctrine. It concluded that the statute preserved the felony murder rule, but not because that rule implied malice; instead, felony murder was preserved by the general murder statute because the legislature had so intended, even though it had repealed the separate statute that actually expressed the doctrine. 668 P.2d at 464-72. The court also held, however, that “malice aforethought is not an element of murder under the felony-murder doctrine.” *Id.* at 475.

<sup>354</sup> See *supra* note 353. See Charles L. Hobson, *supra* note 56, at 512 (discussing the origins of the doctrine, which “has no statutory sanction” but “lies embedded in our law”).

<sup>355</sup> See *supra* note 353.

commission that drew up the statutes repealed the predecessor provision that provided the felony murder rule, but elsewhere the commission assumed that it had preserved the rule, and therefore, according to the California court, “although the balance remains close,” the Commission indeed had preserved the rule, by its expression of intent to do so. “It no longer matters whether the Commission may have [been mistaken]; what matters is (1) the Commission apparently believed that its version of section 189 codified the felony-murder rule . . . , and (2) the legislature adopted section 189 in the form proposed by the Commission.”<sup>356</sup> Although *Dillon* is well written, the need for this kind of roundabout reasoning to discover something so controversial as the felony-murder doctrine, in the hidden crevices of a statute whose language has no relation to it, speaks volumes about the haphazardness of California’s homicide jurisprudence. Furthermore, in later decisions, the court has reverted to referring to felony murder as derived from imputed malice.<sup>357</sup> This vacillation matters, because pattern jury instructions suggest omitting malice in felony murder cases, and it would be nice, to say the least, if such a basic issue were made clear so that trial judges could accurately instruct juries.<sup>358</sup>

In accordance with the common law, the California court has limited the second-degree felony murder doctrine in two major ways: by a dangerousness requirement<sup>359</sup> and by what is called the merger or lesser-included-offense rule.<sup>360</sup> (The rule also is limited in other ways,

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<sup>356</sup> *Dillon*, 668 P.2d at 408.

<sup>357</sup> See *People v. Hansen*, 885 P.2d 1022, 1026-27 (Cal. 1994) (relying on imputed malice without citing *Dillon*, which rejected it).

<sup>358</sup> See Committee on Standard Jury Instructions, California Jury Instruction-Criminal (CALJIC) 8.11, Comment (flatly directing courts, “do not use” a malice instruction if the charge is felony murder; relying on *Dillon*, without citing the later *Hansen* decision, which equally flatly holds that imputed malice is an element of felony murder)(!)

<sup>359</sup> See *infra* Pt. IVA of this article. See generally LEVENSON § 33-35 (discussing California’s requirement); Charles L. Hobson, *supra* note 56, at 512-13 (same).

<sup>360</sup> See *infra* Pt. IVB of this article.

notably by causation elements<sup>361</sup> and by restrictions on vicarious liability,<sup>362</sup> but these issues are beyond the scope of this article.<sup>363</sup>) Because these limits are developed in California on an ongoing basis by judges of differing philosophies, they are neither fully explained nor consistent.<sup>364</sup>

Texas, by way of contrast, defines its felony murder doctrine in a statute adopted by the legislature, which provides that an actor commits murder if he or she<sup>365</sup>

commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

As does California, Texas thus provides multiple ways to commit murder. This article has

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<sup>361</sup> California has not required a “strict causal relationship” between the felony and the death, but only requires that the death occur “in the perpetration” of the felony or attempt and as part of a “continuous transaction.” *See People v. Tapia*, 25 Cal. App.4<sup>th</sup> 984, 1024, 30 Cal. Rptr.2d 851, 873 (1994) (rejecting proximate causation instruction). Arguably, however, the “in the perpetration” component sets a time-relationship requirement, and the “continuous transaction” component requires a relationship between the felony and the death, and perhaps the two together amount to a substitute for causation. Still, it is easy to hypothesize facts that might produce an unjust conviction, e.g., a robber spills a liquid upon which another person slips and is killed by a blow to the head from the floor. *Cf. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW* 481 (2d ed. 1995) (posing similar hypothet in which pickpocket’s victim does of shock). The California jurisprudence would be improved in such cases by the addition of a proximate cause limit. Although Dressler’s hypothet could not support felony murder in California because of the dangerous-felony limit, *see infra* Pt. IVB of this article, his point is sound because slight modification could produce a California felony murder.

<sup>362</sup> Different States reach different results when deaths are caused by cofelons, police officers, or others. LAFAVE 747-55. The two main approaches are the proximate causation approach, which (simply put) holds the defendant liable if the death was causally and foreseeably related to the felony, and the agency approach, which holds the defendant liable for only those deaths caused by agents for whom the defendant is responsible, i.e., cofelons. *See State v. Sophophone*, 19 P.3d 70 (Kan. 2001) (refusing to apply felony-murder rule to death of cofelon whom police officer lawfully shot in self-defense; adopting agency theory and rejecting proximate causation theory advanced by dissent).

The California law, here, is complex. It basically adopts the agency theory, so that codefendants are generally not liable for lawful killings by third parties, but it adds a “provocation” doctrine. If cofelon A provokes a gun battle that “provokes” a police officer to respond by shooting back, and the officer kills cofelon B, cofelon A is liable for B’s death. *See People v. Gilbert*, 408 P.2d 365, 372 (Cal. 1966); *People v. Briscoe*, 92 Cal. App.4<sup>th</sup> 568, 589, 112 Cal. Rptr.2d 401, 418 (2001). *See also* LEVENSON § 5:23 (explaining California’s limitation of felony murder to accomplices’ actions).

<sup>363</sup> These issues are complex enough to consume entire articles by themselves, State-by-State variations in them are not especially dependent on the Pennsylvania pattern, and hence they are not included here.

<sup>364</sup> *See infra* Pts. IVA-B of this article.

<sup>365</sup> Tex. Penal Code § 19.02(b)(3) (Vernon 1993).



already discussed two of three Texas murder types: murder committed intentionally or knowingly, and murder committed with an intent to cause serious bodily injury, coupled with an act clearly dangerous to human life.<sup>366</sup> The provision discussed here adds felony murder as the third method of committing the crime. And as does California, Texas limits felony murder by a dangerousness element and by a merger or lesser-included offense doctrine.<sup>367</sup> The two States differ significantly, however, in their definitions of these limits. Therefore, this article now turns to an analysis of these two issues—dangerousness requirements and merger—to compare the California and Texas provisions with each other, as well as to consider how well they achieve the ostensible purposes of the felony murder doctrine.

***A. The Dangerousness Criterion: Should There Be a Requirement of an “Inherently Dangerous Felony,” or of an “Act Clearly Dangerous to Human Life”?***

**1. California’s “Inherently Dangerous Felony” Approach**

The California felony murder doctrine, by court evolution, includes the requirement of an “inherently dangerous felony.” It is the felony defined by the applicable law that matters, viewed in the abstract and without reference to the individual acts of the defendant in committing it.<sup>368</sup> Thus, a death produced accidentally in the course of grand theft is not felony murder, even if the defendant had acted in a manner outrageously risky to the life of the victim,<sup>369</sup> and conversely, a robbery or arson that accidentally produces a homicide can be felony murder even if the

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<sup>366</sup> See *supra* Pt. IIA of this article.

<sup>367</sup> See *infra* Pts. IVA-B of this article.

<sup>368</sup> *People v. Howard*, 104 P.2d 107, 111 (Cal. 2005) (holding that the felony of eluding a pursuing police officer” by “driving in a willful or wanton disregard for the safety of persons or property” is not an inherently dangerous felony). See also LEVENSON § 5:33-35 (explaining criteria for identifying inherently dangerous felonies and listing certain categories adjudicated as fitting or not fitting the criteria).

<sup>369</sup> *People v. Phillips*, 414 P.2d 353 (Cal. 1966) (doctor of chiropractic who committed grand theft by unlawfully practicing medicine and who repeatedly assured parents that minor child did not require surgery, thereby causing child’s death, was not liable under felony murder rule).

defendant has done nothing particularly dangerous.<sup>370</sup> The rule operates by considering the category of felony, not the case facts.

This inherently-dangerous-felony approach has produced some anomalous results. In *People v. Satchell*,<sup>371</sup> for example, the California Supreme Court held that the felony of possession of a sawed-off shotgun by a previously convicted felon was not “inherently dangerous,” notwithstanding the fact that, in this case, the defendant pointed the illegal firearm at an individual and discharged it. This conclusion followed the court’s reasoning that the category of felony was to be viewed “in the abstract,” or in other words, without regard to the particular facts of the case.<sup>372</sup> Furthermore, the court reasoned that the elements of possession of an illegal weapon by a felon could be committed in ways that were not dangerous to life.<sup>373</sup> This reasoning seems dubious, because most non-homicidal felonies, including robbery and arson, also can be committed in ways that are not particularly dangerous to life: by a stronger robber, for example, who holds a weaker person down while taking her purse, or by an arsonist who burns a building known to be unoccupied. Thus, the *Satchell* reasoning would destroy all felony murder reasoning if applied consistently, although that is not what the California courts have done, of course. Furthermore, one might critique *Satchell* by hypothesizing that the California legislature had a purpose in mind in prohibiting felons from possessing sawed-off shotguns, and the probable purpose was to prevent behavior (namely felons’ possession of dangerous weapons without lawful uses) that the legislature must have considered . . . well, . . . “inherently dangerous”!

Actually, the court recognized this hypothesis in *Satchell*. “An ex-felon by his felony

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<sup>370</sup> *People v. Nichols*, 474 P.2d 673 (Cal. 1970) (upholding liability for death from arson of a motor vehicle); *but see* *People v. Henderson*, 560 P.2d 1180 (Cal. 1977) (rejecting liability).

<sup>371</sup> 489 P.2d 1361 (Cal. 1971).

<sup>372</sup> *Id.* at 1367.

<sup>373</sup> For example, a particular weapon can be possessed “as a keepsake or a curio.” *Id.* at 1370.

conviction has demonstrated instability and a propensity for crime. Thus, there is a *core of logic* in the assumption that if such a person arms himself with a concealable weapon he commits a crime per se dangerous to human life.”<sup>374</sup> The court then proceeded, however, to reject this “core of logic.” “[O]ne cannot logically achieve this conclusion that such person [a felon], when he arms himself, commits a crime inherently dangerous to human life, unless it also be shown that one who so demonstrates instability and propensity for crime is inherently disposed toward acts dangerous to human life.”<sup>375</sup> A possible response to this logic is, “Huh!? I thought that was exactly why the legislature made it a felony for ‘such person’ to ‘arm himself’ this way!”

Furthermore, in *Satchell*, the court reached its result only by overruling several of its prior decisions, in which it had held precisely the opposite: that a felon’s possession of an illegal weapon was, indeed, a crime inherently dangerous to human life.<sup>376</sup> “At the outset, it is clear that this court has unequivocally held on more than one occasion that the offense of [felon in possession] is a felony capable of supporting a second-degree felony murder instruction.”<sup>377</sup> The court then cited no fewer than four then-recent decisions in which it had so held.<sup>378</sup> The court explained its overruling of those decisions only by reference to dictum that disfavored the felony murder rule as “highly artificial” and that concluded that it should not be “extended.”<sup>379</sup> Unlike other courts, the California court made no attempt to point to any “special” factor that would

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<sup>374</sup> *Id.* at 1368, quoting *People v. Lovato*, 258 Cal. App.2d 290, 295-96, 65 Cal. Rptr. 638, 642 (1968) (emphasis added).

<sup>375</sup> 489 P.2d at 1368.

<sup>376</sup> *Id.* at 1366.

<sup>377</sup> *Id.*

<sup>378</sup> *People v. Ford*, 388 P.2d 892 (Cal. 1964); *People v. Ford*, 416 P.2d 132 (Cal. 1966); *People v. Schader*, 401 P.2d 665 (Cal. 1965); *People v. Robillard*, 358 P.2d 295 (Cal. 1960).

<sup>379</sup> 489 P.2d at 1364.

justify such a deviation from stare decisis.<sup>380</sup> This chain of flip-flops stands in sharp contrast to decisions in States such as Minnesota, which has upheld the use of the felony murder rule in closely similar circumstances involving possession of an illegal firearm by a felon.<sup>381</sup> The *Satchell* reasoning shows the kind of unpredictability that suggests that differences in result are nothing but political reflections of judge's preferences. *Satchell* thus makes a strong case for clear statutory definition of such a longstanding and broadly applicable doctrine as the felony murder rule, rather than the kind of casual, tack-and-weave jurisprudence produced by a fickle judiciary. A policy question of this kind should be resolved by the political process, in the legislature, not by changing judicial judgments about whether a rule followed by virtually all American jurisdictions is “artificial” and therefore disfavored.<sup>382</sup>

More recently, the California court held in *People v. Hansen*<sup>383</sup> that the felony of “willful discharge of a firearm at an inhabited dwelling” was inherently dangerous. The underlying felony of discharging a firearm into an “inhabited” dwelling was defined so that it could be committed even if no occupants were present, and for that matter, even if the perpetrator had assured himself that no one was at home.<sup>384</sup> Thus, the predicate felony was capable of being completed without danger to anyone, just as the crime of possession by a felon of an illegal

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<sup>380</sup> This reasoning stands in sharp contrast to decisions of other courts that have attempted to preserve stare decisis by placing constraints on the overruling of established precedents. *E.g.*, *Payne v. Tennessee*, 581 U.S. 808 (1991) (setting out specific factors that may provide the kind of “special justification” required); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (plurality opinion conditioning overruling on factors of unworkability, reliance interests, abandonment, and changed facts, and refusing, therefore, to overrule *Roe v. Wade*). These factors would not have come close to justifying *Satchell*.

<sup>381</sup> *State v. Anderson*, 654 N.W.2d 367 (Minn. 2002) (applying a totality-of-the-circumstances test to consider both the felony and the act; rejecting *Satchell*).

<sup>382</sup> This is not to say that the pre-*Satchell* decisions reaching the opposite result were correct either. *See supra* note 375. Those decisions depend upon “abstract” classification of the felony, which separates felony murder more from individual responsibility than does the opposing approach of focusing upon the defendant’s own dangerous act. *See infra* notes 403-05 and accompanying text.

<sup>383</sup> 885 P.2d 1022 (Cal. 1994) (en banc).

<sup>384</sup> *Id.* at 1027.

weapon was in *Satchell*. Nevertheless, without overruling *Satchell*, and without disapproving its reasoning, the court upheld the conviction of a defendant who shot at a residence and unintentionally killed a thirteen-year-old girl who lived there.<sup>385</sup>

. . . In firing a gun at such a structure, there always will exist a significant likelihood that an occupant may be present. Although it is true that a defendant may be guilty of this felony even if, at the time of the shooting, the residents of the inhabited dwelling happen to be absent, the offense nonetheless is one that, viewed in the abstract—as shooting at a structure that currently is used for dwelling purposes—poses a great risk or "high probability" of death within the meaning of [prior decisional law]. The nature of the other acts proscribed by [the statute] reinforces the conclusion that the Legislature viewed the offense of discharging a firearm at an inhabited dwelling as posing a risk of death comparable to that involved in shooting at an occupied building or motor vehicle.

Furthermore, application of the second degree felony-murder rule to a homicide resulting from a violation of [this statute] directly would serve the fundamental rationale of the felony-murder rule—the deterrence of negligent or accidental killings in the course of the commission of dangerous felonies. . . .

In reaching this conclusion, the court did not consider its earlier dictum disfavoring the felony murder rule as “artificial” or refusing to “extend” it. The approach of avoiding that dictum seems appropriate. Considering the rationale of a doctrine and attempting to follow the legislative intent will normally provide superior reasoning, as opposed to relying on vague indications of disfavor unrelated to the statutory policy, which provide little structure for either applying or not applying the doctrine in a given case.

Justice Mosk dissented in *Hansen*, on the arguable ground that the result was inconsistent with the court’s precedents,<sup>386</sup> as well as with the more dubious suggestion that a proper predicate felony must be one from which death, in any given instance, is “highly probable.”<sup>387</sup> Indeed, this was what the majority had said: the felony must be one from which death must be

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<sup>385</sup> *Id.*

<sup>386</sup> *Id.* at 1036 (analyzing *Satchell* and other decisions).

<sup>387</sup> *Id.* at 1035.

“highly probable.”<sup>388</sup> Even robbery, rape, or arson would fail this test as predicates for felony murder,<sup>389</sup> because most robberies, rapes, and arsons do not result in homicides, and thus they are not crimes from which it can be said that death is a “high probability.” The court also referred to “a great risk” of death, for which drive-by shootings into inhabited residences may arguably qualify,<sup>390</sup> and it treated this phrase as the equivalent of “a high probability.” To say the least, the reasoning in *Hansen* is muddled.

In fact, there simply is no consistency whatsoever in the California court’s distinctions of crimes that are inherently dangerous from those that are not. Here is the court’s own list of its holdings, from its 2005 decision in *People v. Howard*:<sup>391</sup>

Felonies that have been held inherently dangerous to life include shooting at an inhabited dwelling; poisoning with intent to injure; arson of a motor vehicle; grossly negligent discharge of a firearm; manufacturing methamphetamine; kidnapping; and reckless or malicious possession of a destructive device.

Felonies that have been held not inherently dangerous to life include practicing medicine without a license under conditions creating a risk of great bodily harm, serious physical or mental illness, or death; false imprisonment by violence, menace, fraud, or deceit; possession of a concealable firearm by a convicted felon; possession of a sawed-off shotgun; escape; grand theft; conspiracy to possess methedrine; furnishing phencyclidine; and child endangerment or abuse.

It is difficult to see why recklessly possessing a destructive device is “inherently dangerous” while intentional possession of a concealed weapon by a felon (or possession of a sawed-off shotgun) is not. Likewise, it is unclear why manufacturing methamphetamine is inherently

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<sup>388</sup> See *supra* notes 384-85 and accompanying text.

<sup>389</sup> These felonies still would qualify because they are set out in the first-degree statute itself, see *supra* Pt. ID of this article, but their nonconformity to the “high probability” test arguably exposes that approach as unworkable.

<sup>390</sup> “Great risk” of death remains problematic, however, because it does not answer the question, “Just *how* great?” In the same passage, the court made clear its holding that “great risk” was a relative term, referring to risks of similar magnitude to those created by other felonies that are held to support second-degree murder. See *supra* notes 384-85 and accompanying text.

<sup>391</sup> 104 P.3d 107, 111-12 (Cal. 2005) (citations omitted). For a similar pair of lists, see LEVENSON § 5:34-5:35.

dangerous while furnishing phencyclidine is not. And what policy determines that “grossly negligent discharge of a firearm” is inherently dangerous, while (intentionally) practicing medicine without a license “under conditions creating a risk of great bodily harm, serious physical or mental illness, or death” is not? These are decisions reached without any basic rationale, and worse yet, with no respect for legislative classifications.<sup>392</sup>

In fact, in *Howard*, the predicate felony was that of “eluding a pursuing police officer [by] driving in willful or wanton disregard for the safety of persons or property.”<sup>393</sup> The requirement of “willful or wanton disregard for . . . safety” might well alert a court that the legislature considers the defined felony to be “dangerous.” The *Howard* majority, however, declined to follow this indication of legislative intent and instead found an absence of inherent dangerousness in the essentially arbitrary way in which it had done so in the past: by referring to felony murder as “artificial” and as “deserving no extension beyond its required application,” without doing any meaningful analysis of the proper “required application” of the rule.<sup>394</sup>

Two justices dissented in *Howard*. It can be argued that both were closer to the mark than the majority. Justice Baxter looked to the definition of the offense, which, as he put it, is “inherently dangerous [because] it creates a substantial risk that someone will be killed.”<sup>395</sup> Furthermore, Justice Baxter would have considered the defendant’s actual conduct: “[T]here is no doubt that the defendant [in this case] committed exactly the reckless endangerment of human

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<sup>392</sup> Even when the legislation has expressly included a danger of death or near death as an element, as in the last example, the California court has denied the existence of that danger. *See also infra* note 393 and accompanying text.

<sup>393</sup> 104 P.3d at 109. The majority’s reasoning was that a person could commit the predicate felony by conduct dangerous only to “property,” and in such a case there might be no inherent danger to “persons.” But this kind of reasoning, depending upon a contrived possibility of violation with no danger to persons, would preclude the use of *any* felony as a predicate. The residential target in *Hansen* could have been unoccupied, for example. This approach would destroy the felony-murder rule. Furthermore, it is difficult to imagine a police chase that endangers property without creating risk for persons.

<sup>394</sup> *Id.* at 110-12.

life forbidden by the statute.”<sup>396</sup> This approach imports a “dangerous act” or “totality of the circumstances” test, which would look to more than the “abstract” felony: arguably, a more promising approach.<sup>397</sup> Justice Brown’s analysis was more radical, although she “agree[d] with Justice Baxter that if any offense should easily qualify as inherently dangerous, [this offense] certainly would.”<sup>398</sup> She noted that all three courts of appeals that had considered the question had agreed with the “inherently dangerous” label, and she concluded that the California court’s approach “suggest[ed] a level of arbitrariness we should make every effort to eliminate from the criminal law.”<sup>399</sup> Justice Brown’s solution: “I would abrogate the second-degree felony murder rule and leave it to the Legislature to define precisely what conduct subjects a defendant to strict criminal liability.”<sup>400</sup> Although it is doubtful that the court itself should have abolished a doctrine that, although judicial in origin, has received such longstanding legislative acquiescence, Justice Brown’s suggestion for more precise legislative definition should sound a clarion call to the California legislature.

The problem, it is submitted, lies in California’s “inherently dangerous felony” test. The term is vague enough so that most felonies will require ad hoc adjudication to determine whether they qualify. And the results do not seem likely to reflect the policies supporting the felony murder rule as they are hypothesized above.<sup>401</sup> In *Satchell*, for example, where a previously convicted felon possessed an illegal weapon and pointed and discharged it at a human being, the

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<sup>395</sup> *Id.* at 116.

<sup>396</sup> *Id.*

<sup>397</sup> See *supra* note 381 and accompanying text (describing Minnesota’s totality of the circumstances test); *cf. infra* notes 403-05 (describing Texas’s “dangerous act” approach).

<sup>398</sup> *Id.* at 114.

<sup>399</sup> *Id.* at 115.

<sup>400</sup> *Id.*

<sup>401</sup> Compare text accompanying *supra* note 391 (describing California decisions) with *supra* notes 346-51 and accompanying text (describing arguable rationales of the felony murder rule).



policies of reflecting grades of blameworthiness, condemning the taking of human life, deterring outrageously dangerous conduct by felons, as well as other arguable policies, seem to support invocation of the felony murder rule, assuming, of course, that those policies are validly hypothesized.<sup>402</sup> And the analysis of the drive-by shooting in *Hansen*, preoccupied as it was with the possibility that the crime of shooting into a residence could theoretically be committed in a safe and sound manner, seems to have very little to do with the reasons for having a felony murder doctrine, even if *Hansen* is considered correct in upholding its application to the particular felony at issue.

## **2. The “Dangerous Act” Approach: Is It a Better Way?**

Perhaps a sounder way to use the dangerousness element to limit the felony murder doctrine is to require the jury to focus instead on the defendant’s actions in the particular case. Perhaps, in other words, the dangerousness limit would perform its function of keeping the felony murder rule consistent with its policies if the crime were defined in terms of the dangerousness of the individual defendant’s conduct, rather than by reference to the felony viewed “in the abstract.” The Texas statute accomplishes this purpose by requiring not only a predicate felony, but also “an act” by the individual defendant in the particular case that is “clearly dangerous to human life.”<sup>403</sup> Through this language, the Texas statute offers an answer to critics who argue that the felony murder doctrine separates guilt from blameworthiness.<sup>404</sup> Individual blameworthiness is a statutory element of the crime, at least to the extent that the law requires objective dangerousness “clearly” manifested by this individual’s actions during a felony. Inconsistent rhetoric and dubious results in defining inherently dangerous felonies are

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<sup>402</sup> See *supra* notes 346-51 and accompanying text.

<sup>403</sup> Tex. Penal Code § 19.02(b)(3) (Vernon 1993).

<sup>404</sup> See *supra* note 344 and accompanying text.

not necessary under this dangerousness limit. The Texas statute thus seems to succeed better than the California approach in carrying out the policies of crime grading corresponding to blameworthiness, condemnation of actions that take human life, deterrence of conduct that creates a risk of death during commission of a felony, and other purposes that can be hypothesized in support of the felony murder doctrine.<sup>405</sup> The California legislature should hear Justice Brown's message, and it can make sense of the dangerousness limit by defining felony murder to require a "clearly dangerous" act by the individual defendant.

***B. "Merger": A Sound Doctrine, but One Capable of Unsound Application***

**1. California's "Bootstrapping" and "Independent Felonious Purpose" Doctrines**

Another limit commonly found in the felony murder doctrines of the various States is called "merger."<sup>406</sup> The simplest example involves lesser included homicides, of which the most illustrative is manslaughter. Without a limit on the use of manslaughter as a predicate felony, a murder conviction could be obtained by proof otherwise sufficing only for manslaughter, by the straightforward (if dubious) reasoning that manslaughter is itself a felony. It is dangerous, and it causes death. The unvarnished felony murder rule therefore converts all manslaughters, automatically, into murders.<sup>407</sup> This reasoning, of course, conflicts with the crime-grading system created by the legislature in defining the crime of manslaughter in the first place. It also violates the usual rule of statutory construction, that all language and all provisions passed by the legislature are supposed to have some sort of meaning. Therefore, most jurisdictions have inferred a limit: the murder that otherwise would result from the felony murder doctrine is "merged" into the lesser included crime, if the lesser offense is all that is supported by the

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<sup>405</sup> See *supra* notes 346-51 and accompanying text.

<sup>406</sup> See Crump, *Felony Murder* 377-78. See also LEVENSON § 5:23 (discussing merger doctrine and its limitation by independent felonious purpose doctrine).

evidence.<sup>408</sup>

This example, however, is only the beginning. Many jurisdictions apply the merger limitation to crimes other than manslaughter. California, for example, applies the doctrine to assaultive offenses, holding that they cannot support felony murder. In *People v. Ireland*,<sup>409</sup> the California court explained its application of the merger doctrine to assaults by concluding that murder convictions based upon assault would amount to “bootstrapping.” The court reasoned that “the felony murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault—a category which includes the great majority of all homicides.”<sup>410</sup> This reasoning, in turn, has required the courts in California to sort out which crimes are sufficiently assault-like to require merger. What about assault that is not merely assault, but that qualifies for the more serious label of assault with a deadly weapon?<sup>411</sup> Or, for a more challenging example, what about discharging a firearm into an inhabited building, as in the *Hansen* drive-by shooting case discussed in the previous section?<sup>412</sup> Applying felony murder to *Hansen* would “effectively preclude the jury from considering malice aforethought” in an assault-like case, exactly as in *Ireland*. The California court, however, distinguished *Ireland* by reasoning that a drive-by shooting involves an independent felonious purpose, separate from the assaultive conduct it may involve.<sup>413</sup>

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<sup>407</sup> See *Id.*; see also LAFAVE 760-61 (containing similar analysis, but without using “merger” terminology).

<sup>408</sup> See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 485-86 (2d ed. 1995).

<sup>409</sup> 450 P.2d 580 (Cal. 1969). See also LEVENSON § 5:23 (discussing application of merger to assaultive crimes under “bootstrapping” rationale).

<sup>410</sup> *Id.* at 590.

<sup>411</sup> Cf. *Id.* at 589-90 (holding that the same rationale applies).

<sup>412</sup> See *supra* notes 383-90 and accompanying text.

<sup>413</sup> 885 P.2d at 1029-30.

. . . [T]he merger rule [is] inapplicable [when] the defendant [has] exhibited a *collateral and independent felonious design* that [is] separate from the resulting homicide. [W]e [have] held that where the underlying felony is committed with a design collateral to, or independent of, an intent to cause injury that would result in death, “[g]iving a felony-murder instruction in such a situation serves rather than subverts the purpose of the rule.” . . .

For the foregoing reasons, we conclude that the offense of discharging a firearm at an inhabited dwelling house does not “merge” with a resulting homicide . . . , and therefore that this offense will support a conviction of second degree felony.

In the same passage, however, the California court also declined to accept the independent felonious design theory. Even if *Hansen* is correctly decided, this reasoning is unsatisfying. It is difficult to perceive any “independent felonious purpose,” apart from the purpose of shooting into a building, that is to be found in the unitary act of shooting into a building. But without it, *Ireland* is difficult to distinguish. Perhaps the answer is that *Ireland*, which applies the merger doctrine to assaults, is wrongly decided. The courts of other States as diverse as Georgia<sup>414</sup> and Minnesota<sup>415</sup> have refused to follow California’s example and have instead predicated the felony murder doctrine on assaults.

Another issue is presented by burglaries that include assaultive elements. In *People v. Wilson*,<sup>416</sup> the California Supreme Court applied the merger doctrine to bar the use of burglary with intent to commit assault as a predicate for felony murder. The court used “bootstrapping” reasoning similar to that in *Ireland* to conclude that the merger doctrine applied.<sup>417</sup> The court did not view the crime of burglary as containing an independent felonious purpose or ingredient, even though the entry into the victim’s residence that made out the burglary was arguably an

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<sup>414</sup> See *Wyman v. State*, 602 S.E.2d 619 (Ga. 2004).

<sup>415</sup> See *Cole v. State*, 542 N.W.2d 43 (Minn. 1996) (basing the rule on a felony theft and second-degree assault).

<sup>416</sup> 462 P.2d 22 (Cal. 1970). See also LEVENSON § 5:23 (discussing this situation).

<sup>417</sup> *Id.* at 26.

independent ingredient.<sup>418</sup> *Hansen*, which was resolved on grounds of independent felonious purpose,<sup>419</sup> was decided after *Wilson*, but seems inconsistent with it; if one can see an “independent felonious purpose” in a drive-by shooting that results in death, it seems even more persuasive to argue that the defendant’s own armed entry into the victim’s residence can supply such an independent purpose or ingredient. Furthermore, the purposes of the felony murder rule seem to be carried out by applying the rule to a case like *Wilson*, especially to the extent that the underlying policies include the grading of crimes to correspond to their blameworthiness and severity. New York has pointedly disagreed with the merger argument in *Wilson* by observing that burglaries of residences involve a high risk of violence.<sup>420</sup> The majority of States, in fact, follow the New York approach.<sup>421</sup>

## **2. Texas’s Statutory Approach**

The Texas statute, in sharp contrast to the reasoning of the California court, identifies only one felony that is subject to merger: manslaughter.<sup>422</sup> Texas thus avoids the anomaly in *Wilson* of applying merger to a killing during a burglary.<sup>423</sup> But there are other anomalies. First, what about assaultive killings? The statute does not clearly resolve the issue. At first, the Texas Court of Criminal Appeals inferred a merger bar as a matter of statutory construction, as California did in *Ireland*, to prevent the use of assault as a predicate felony for murder.<sup>424</sup> Later, recognizing that the text of the statute conflicted with this application of merger, the Texas court

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<sup>418</sup> *Id.* at 29.

<sup>419</sup> See *supra* notes 412-13 and accompanying text.

<sup>420</sup> *People v. Miller*, 297 N.E.2d 85, 87 (N.Y. 1973).

<sup>421</sup> See LAFAVE 762.

<sup>422</sup> Tex. Penal Code § 19.02(b)(3) (Vernon 1993).

<sup>423</sup> See *Homan v. State*, 19 S.W.3d 847 (Tex. Crim. App. 2000).

<sup>424</sup> *Garrett v. State*, 573 S.W.2d 543, 546 (Tex. Crim. App. 1978).

overruled itself and allowed felony murder to be based on aggravated assault.<sup>425</sup> Today in Texas, in other words, if one feloniously assaults another person but inadvertently goes too far and kills the victim, the felony murder doctrine can apply.

This result is subject to the criticism that prompted the California court to bar assault as a predicate felony by invoking the merger doctrine in *Ireland*. The assault that the perpetrator commits is one course of conduct with the murder, and the “bootstrapping” argument that the court there invoked seems to apply.<sup>426</sup> As a matter of policy, however, basing felony murder on aggravated assault does not necessarily derogate from the goal of matching offense grades to blameworthiness. Felony assault, in Texas, is not made out by just any assault; there is a lesser offense of simple assault.<sup>427</sup> The felony of aggravated assault requires an additional element:<sup>428</sup> the infliction of “serious bodily injury,” defined to mean protracted loss of use of a bodily member or organ,<sup>429</sup> or the use of a deadly weapon. Thus, the defendant who pleads bootstrapping is advancing an unappealing claim. The argument sounds like this: “Yes, I shot the victim (or yes, I ran over him, or bashed his head in with a pool cue), but I only meant to maim (or to severely injure, or make a paraplegic out of) him. Gosh, I guess I overdid it and killed him, but I shouldn’t be guilty of murder!” As is indicated above, a number of other States base felony murder on assaults.<sup>430</sup> Furthermore, so did the common law, which held that intent to cause

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<sup>425</sup> *Lawson v. State*, 64 S.W.3d 396 (Tex. Crim. App. 2001), *following* *Johnson v. State*, 4 S.W.3d 254 (Tex. Crim. App. 1999).

<sup>426</sup> *See supra* notes 409-10 and accompanying text.

<sup>427</sup> Tex. Penal Code § 22.01 (Vernon 1999).

<sup>428</sup> Tex. Penal Code § 22.02 (Vernon 1999).

<sup>429</sup> Tex. Penal Code § 1.06(46) (Vernon 1994). One can argue that felony murder is unnecessary in this situation, because Texas expressly defines murder in the basic statute as including intent to cause serious bodily injury. *But see infra* note 438.

<sup>430</sup> *See supra* notes 414-15 and accompanying text. In fact, so does California, apparently—but in a roundabout way. *See infra* note 438.

serious injury supplied malice aforethought, if it resulted in death in fact.<sup>431</sup> This principle was not a part of the felony murder doctrine but furnished a separate kind of common law malice. In reading its murder statute to bar felonious assaults that result in death from supporting felony murder, the California Supreme Court arguably violated one of its own frequent rules of statutory construction, which calls for the court to interpret statutory terms that derive from the common law in accordance with the common law.<sup>432</sup>

But there are other inferable results that could possibly follow from the Texas statute that would not be so easily defended. For example, the crime of negligent homicide<sup>433</sup> is a “felony other than manslaughter,” and it therefore might be considered as a predicate felony under the literal statutory language. Although negligent homicide is a felony in Texas today, it was a misdemeanor<sup>434</sup> at the time that the “felony other than manslaughter” language was adopted, and this history may explain the evident legislative oversight that created this possibility. But using negligent homicide in this manner would violate the legislative intent for the same reasons that using manslaughter would. Therefore the Texas court has barred its use as a matter of construction, by a holding that extends to “lesser included offenses” of manslaughter.<sup>435</sup> The

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<sup>431</sup> See LAFAVE 737-39.

<sup>432</sup> See, e.g., *Keeler v. Superior Court*, 470 P.2d 617 (Cal. 1970) (concluding that statutory term, “human being,” did not include a fetus or unborn child, largely on the asserted ground that this interpretation prevailed at common law).

Some California courts have, however, found malice in intent-to-cause-serious-injury homicides, even if not directly, by stretching the abandoned-heart murder doctrine to fit. See LEVENSON § 5:8 (discussing case of *People v. Noel*, so holding). An intent to cause serious injury that produces a homicide does seem likely to reflect “conscious indifference” to life in many instances. But the doctrine remains seriously inadequate. First, it is possible for a homicide unambiguously to show intent to cause serious injury, but to leave reasonable doubt about conscious indifference to life. “I intended only to chop his hand off, not to kill him; but he moved.” Second, evidence may clearly show an intent to injure but not explicitly speak to conscious indifference; e.g., a defendant confesses to intent to cause serious bodily injury but not to subjective awareness of risk of death. Further, the *Noel* holding is that of a court of appeals only; it does not have the imprimatur of the California Supreme Court. It would have been better if that court had followed its own jurisprudence and faithfully incorporated the common law in interpreting common law terms.

<sup>433</sup> Tex. Penal Code § 19.05 (Vernon 1994).

<sup>434</sup> *Id.* (Comment).

<sup>435</sup> *Lawson v. State*, 64 S.W.2d 396 (Tex. Crim. App. 2001).

anomaly thus disappears as a result of judicial interpretation.

Another controversial issue—one that persists—concerns felony murder based on the predicate crime of endangerment or injury to a child. As is indicated above, California disallows the use of child abuse felonies as a basis.<sup>436</sup> Texas, however, allows it.<sup>437</sup> Arguments about merger that distinguish “independent felonious purpose” from “bootstrapping,”<sup>438</sup> as in California, would lead to the result that California in fact reaches: a conclusion that, since the act constituting the felony of child abuse is an integral part of the course of conduct causing death by child abuse, felony murder is barred by merger.<sup>439</sup> The different Texas result, however, can be based both on different statutory language and on policy arguments. Texas’s crime of injury to a child<sup>440</sup> is defined differently from manslaughter, with entirely different ingredients, and it is not a lesser included offense.<sup>441</sup> Since the text of the felony-murder statute excludes only manslaughter as a predicate, fidelity to the legislation is arguably advanced by allowing injury to a child to serve as a predicate. Furthermore, the purpose of child-endangerment or -injury statutes, as separate enactments from assaultive provisions applicable to adult victims reflects the policy justifications for felony murder. The vulnerability of children of the covered ages and their dependence on adults are a part of this purpose. Another part is the tendency of injuries to children to be based on long-duration cycles of repeated abuse in residential settings that are inaccessible to others. Finally, yet another part of the policy is the difficulty of proving which

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<sup>436</sup> See *supra* note 391 and accompanying text. The California court’s reasoning, however, if based on the conclusion that “child endangerment or battery” is not inherently dangerous is dubious on the grounds stated in *supra* Pt. IVA of this article. The decision may better be described as based on merger.

<sup>437</sup> See *Johnson v. State*, 4 S.W.3d 254, 256 (Tex. Crim. App. 1999); *Ex Parte Easter*, 615 S.W.2d 719 (Tex. Crim. App. 1981).

<sup>438</sup> See *supra* notes 409-10 and accompanying text.

<sup>439</sup> See *supra* note 391.

<sup>440</sup> Tex. Penal Code § 22.04 (Vernon 2003).

<sup>441</sup> See authorities cited *supra* in note 437.



actor among two or more has injured a child, even when the child is unmistakably known to have been abused.<sup>442</sup> This difficulty is aggravated by the clandestine nature of the crime and by privileges<sup>443</sup> that prevent testimony from those most likely to know about it. These considerations arguably support the approach of allowing felony murder to be predicated on child-abuse felonies.

The consequences of the Texas statute do not end there, however. The statute provides that the felony of injury to a child can be committed not only intentionally, knowingly, or recklessly, but also with “criminal negligence,” which is negligence involving a “gross deviation” from ordinary conduct.<sup>444</sup> Therefore, if it is used as the basis of felony murder, this crime creates a species of murder for which the mens rea may be no more serious than gross inadvertence. The Texas court, in fact, has upheld murder convictions based on injury to children supported by instructions permitting criminal negligence to suffice.<sup>445</sup> Should this rule of law be maintained? Actually, California allows negligence-based offenses to serve as predicates for murder,<sup>446</sup> and thus this Texas result is not unusual. The Texas cases thus far generally seem to have involved caregivers of children who have killed them under egregious

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<sup>442</sup> See Audrey E. Stone & Rebecca J. Fialk, *Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse*, 20 HARV. WOMEN’S L.J. 205 (1997) (discussing state statutes barring conduct dangerous to a child); Milton Roberts, *Validity and Construction of Penal Statute Prohibiting Child Abuse*, 1 A.L.R.4<sup>th</sup> 38 (2005) (same).

<sup>443</sup> Usually, multiple actors, including those who have merely witnessed the events, have reason to fear prosecution based not only on affirmative acts but also on omissions, and therefore witnesses frequently can rely on the privilege against self-incrimination. The husband-wife privilege also applies in many jurisdictions. See *Trammel v. United States*, 445 U.S. 40 (1980) (permitting spouse to refuse to testify).

<sup>444</sup> Tex. Penal Code §§ 6.03(d), 22.04(a) (Vernon 2003).

<sup>445</sup> Ex parte Easter, 615 S.W.2d 719, 720 (Tex. Crim. App. 1991); Flores v. State, 102 S.W.2d 328, 330 (Tex. App. 2003).

Actually, the California legislature has acted to address the gap left by child abuse homicides. See Cal. Penal Code § 273ab (2006). This statute criminalizes certain child assaults by caregivers resulting in death, and it carries the same imprisonment range as first-degree murder.

<sup>446</sup> See text accompanying *supra* note 391 (holding that offense of “negligent discharge of a firearm” is a proper predicate). By itself, however, this example obviously does not establish the wisdom of using negligent felonies as murder predicates, which remains debatable.

facts.<sup>447</sup> The cases appear, in other words, to carry out the policies discussed above.

But what of a case not involving a caregiver: for example, a case involving a child killed in an outrageously careless traffic accident by an “act clearly dangerous to human life” that is a sufficiently “gross deviation” to be labeled criminal negligence?<sup>448</sup> That sort of case does not appear in the appellate reports, and it is tempting to conclude that felony murder would not apply. But the Texas jurisprudence, read literally, seems to permit it. And as these words were being written, a murder complaint was pending in Houston against a bus driver who arguably drove his vehicle with criminal negligence so that it killed a child whom he apparently did not see. The theory of the charge was felony murder, with criminally negligent injury to a child as the predicate. It seems doubtful that this charge was consistent with the legislative intent, and arguably this is one area in which the California law is clearer and more consistent with felony murder policies than the Texas law. The smart money, however, is on a holding by the Texas courts that applies merger to this situation, and one might guess that this anomaly in Texas may disappear. In fact, the grand jury indicted the bus driver only for manslaughter, after the prosecutor presented the case as one of recklessness—subjective awareness of a high risk of death reflected in outrageously dangerous conduct—instead of a felony murder case.<sup>449</sup> Texas’s

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<sup>447</sup> Consider the cases cited in *supra* note 445, for example. In both, criminal negligence was charged along with higher mental states such as intent. In *Easter*, the proof showed that the defendant “beat and choked the child for about two hours before she died.” 615 S.W.2d at 721. In *Flores*, the witness left the sleeping child in defendant’s sole care for five to ten minutes and returned to find the child “battered so badly that death followed shortly thereafter.” 102 S.W.2d at 332-33.

<sup>448</sup> The “act clearly dangerous to human life” requirement comes from the felony murder statute, *see supra* notes 403-05 and accompanying text, and the requirement of a sufficiently “gross deviation” to constitute criminal negligence comes from the injury to a child statute and the definition of criminal negligence. *See supra* note 444 and accompanying text.

<sup>449</sup> The responsible assistant district attorney had “direct-filed” the complaint in district court but continued to investigate it without having yet presented it to a grand jury, and therefore it remained possible that a grand jury might ultimately no-bill the defendant or that the prosecutor might decline to present it. *See* Rick Casey, *D.A. Plays Cop in School Bus “Murder” Case*, Hous. Chronicle, Nov. 13, 2005, at B1; Rick Casey, *D.A. Wasn’t in Loop on Bus “Murder” Case*, Hous. Chronicle, Oct. 14, 2005, at B1; interview with Harris County (Houston) District Attorney Chuck Rosenthal, in Houston, December 12, 2005.

authorization of felony murder based on injury to a child may nevertheless remain arguably justified in terms of statutory interpretation and policy if the courts prevent it in cases such as the bus driver's, and the question that then would persist would be whether the Texas jurisprudence, with its stronger condemnation of killings of children, is superior to California's approach.

## CONCLUSION

The Pennsylvania pattern creates a messy jurisprudence. When one finds judicial decisions holding that malice is not an element of a particular kind of murder, and coexisting with those decisions one also finds decisions in the same jurisdiction holding, on the contrary, that malice is an essential element, something is wrong.<sup>450</sup> And the contradiction matters, because trial judges cannot possibly know, in the most basic way, what to say to juries in their instructions. When this sort of flip-flop persists over decades, in multiple opinions, one wonders how jury verdicts or court opinions can possibly maintain any fidelity to the State's jurisprudence. Then, when one also sees that the legislature has repealed a certain definition of murder, but that it remains in place because the state supreme court assumes that the legislature did not intend to do what it did but instead intended to preserve the particular version of murder even as it repealed it, one's confidence in both the legislature and the courts can only be shaken.<sup>451</sup> The Pennsylvania pattern precipitates this kind of jurisprudence by its dependence on oxymoron, metaphor, misnomer, and ambiguity.

### *A. The Legislative Response*

***The Premeditation Criterion: Arguments for Legislative Repeal.*** In some jurisdictions (particularly California), the jurisprudence of homicide seems like a contraption held together by duct tape and bailing wire. The separation of two degrees of murder by the concept of

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<sup>450</sup> See *supra* notes 353-57 and accompanying text.

premeditation, for example, puts the courts to a difficult challenge.<sup>452</sup> To make sense of this standard in practice, the courts inevitably find themselves forced to explain to juries that no time interval should be required for premeditation. Otherwise, some of the worst kinds of murders, those that are bizarre, senseless, and brutal, will merit acquittal of first-degree murder precisely because they are bizarre, senseless, and brutal. Hence, the Pennsylvania pattern pushes courts toward a concept of “instant premeditation,” or premeditation not requiring any mental focus prior to the crime itself. This concept seems to conflict with the requirement of premeditation, which implies, at the very least, a need for some kind of prior mental focus.

Furthermore, a concept of instant premeditation undercuts the legislative distinction between the two degrees of murder. Premeditation becomes synonymous with intent, which arguably should be insufficient for first-degree murder, since intent theoretically supplies only malice, which in turn is a requirement for both first and second degree murder. In response to this anomaly, some courts have attempted to create a jurisprudence of premeditation that distinguishes it sharply from intent. Thus, the California court’s decision in *Anderson*, which set out judicially invented “factors” by which to judge premeditation, was an understandable, if badly misguided, effort to honor the legislative intent. Unfortunately, the court thus forced premeditation into a Procrustean bed, such that the definition meant that some of the most aggravated murders required acquittal of first degree. It also distorted the legislative intent.

The ostensible solution to this dilemma is to paper over the problem. The courts can keep ill-fitting decisions in place but announce that they have the status only of guidelines, and they can instruct juries on premeditation in ways that undercut it by equating it, in effect, to intent.

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<sup>451</sup> See *supra* note 356 and accompanying text.

<sup>452</sup> See *supra* notes 135-41 and accompanying text.

This is the result that California unfortunately has reached with decisions such as *Perez*,<sup>453</sup> and in fact it is a result shared at least to some degree, with variations, in other jurisdictions. The trouble is, this approach muddles the standard. It requires litigation of the first-degree issue up and down the appellate ladder in virtually every case. It wastes millions of dollars' worth of scarce criminal justice resources that could be dedicated instead to better policing, victim-witness services, or improvement of prison conditions. It detracts from the coherent presentation of other appellate issues that might be more meritorious. At the trial level, it results in instructions that create a confusing non-standard. California has pretended that this confusion is not a problem by labeling it, euphemistically, as jury "discretion." Instead, the result is lawlessness. Juries can reach results only by applying their own philosophies of crime seriousness, producing disparity and arbitrariness. In doing so, they are free to hinge their decisions on invidious criteria.

***Degrees of Murder: The Case for Abolition.*** If this condition were the result of a necessary concept, one that furthered sound policies of criminal justice, it might be tolerable. But the premeditation standard is not necessary; it is not even helpful. Both ancient and modern critics have explained persuasively why premeditation is a dysfunctional method of separating the most serious homicides from lesser ones. The drafters of the Model Penal Code concluded that beyond a requirement of knowledge or intent, "no further grading distinctions . . . can usefully be made . . . ."<sup>454</sup> A focus upon premeditation simply produces bad crime grading. This critique is not new. The great historian James Fitzjames Stephen expressed it in similar terms almost 150 years ago, and commentators in the 2000's have done the same.<sup>455</sup> The message is a simple one: the Pennsylvania pattern has outlived its usefulness, and it should be scrapped.

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<sup>453</sup> See *supra* notes 142-43 and accompanying text.

<sup>454</sup> Comment, Model Penal Code § 210.2 (Official Draft and Revised Comments 1980).

<sup>455</sup> See *supra* notes 101-02 and accompanying text.

Attempts to divide the crime of murder into pigeonholes outstrip our ability to use words of sufficient precision to achieve the goal. Justice Cardozo doubted the ability of juries to apply the fine standard implicit in the idea of premeditation.<sup>456</sup> One might modify that message to say, with less lawyer-oriented egocentrism, that lawgivers cannot compress all of the relevant factors into a premeditation standard that will enable juries to separate murder rationally into degrees. The ancient function of the Pennsylvania pattern, to confine the death penalty, is now accomplished by separate definitions and factors adapted more directly to that goal.<sup>457</sup> A single degree of murder is preferable, and the legislatures should enact this change.

***Malice Aforethought: An Unnecessary Distractant.*** At the same time, the Pennsylvania pattern depends upon the multivariate concept of “malice aforethought.”<sup>458</sup> The double misnomer that these words convey produces confusion at best and arbitrariness at worst. Jurors in homicide cases often must navigate through instructions containing multiple concepts of murder, multiple lesser included offenses, and multiple defenses, each depending on multiple elements. The result is that they must apply literally dozens of technical but similar-sounding legalisms. The cumulative confusion unnecessarily added by the superfluous term, “malice aforethought,” can only furnish a distraction. The misnomer inherent in this language can be addressed by firm direction to the jury to ignore these words because they do not mean what they say, but the jury-education effort that goes into this non-issue is lost to other important concepts that the jury should master. People can absorb only so many twists and turns in a finite time. Besides, a charge that requires the jury to ignore words given by the judge, because they are meaningless, seems unwise in the extreme; one might well fear that this approach would create disrespect for

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<sup>456</sup> BENJAMIN CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS 99-100 (1931).

<sup>457</sup> See *supra* note 15 and accompanying text.

<sup>458</sup> See *supra* Pt. II of this article.

other parts of the charge. Jurors may wonder, “Is the definition of intent similarly meaningless, or is the standard of proof beyond a reasonable doubt something to be ignored too?,” if they are told that solemn terms such as malice aforethought are devoid of significance.

Again, this effect would be tolerable if the malice terminology were useful. But it is only a historical appendage, an atavistic relic. The jury necessarily must be instructed separately about the meaning of express malice, or intent, and implied malice, or depraved-heart murder. Malice adds nothing to those instructions. It can be removed from the judge’s charge without any loss of meaning. The charge would be improved if the legislature were to mandate this result and to tell the courts to instruct solely on intent and depraved-heart murder.

***Depraved-Heart Murder: A Dysfunctional Concept and a Gap in Crime Definition.***

But another difficulty with the malice standard is that it includes the depraved-heart variety of the crime. Adjudication by metaphor is a bad idea. A metaphor is a species of analogy, and thus it is inferior to definition when precision is important.<sup>459</sup> In fact, metaphor is a literary device, one that achieves fuzzy truths precisely by confusing disparate concepts. The depraved-heart formula enables the jury to set its own standard by guessing just how depraved is “depraved,” and thus it inevitably must create disparity and arbitrariness. It invites jurors to consider what they do not like about the defendant in ways extrinsic to any crime definition and then to use that pure dislike to return a verdict of murder. It even invites the use of invidious criteria. The best solution to this problem is legislative: to repeal the depraved-heart formula and to substitute for it a standard with greater precision, such as subjective awareness of a high degree of risk or conscious indifference, coupled with causally dangerous behavior. Better yet, the legislature could follow the Model Penal Code by reserving the label of murder for intentional and knowing

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<sup>459</sup> See *supra* Pt. IIB of this article.

killings, with certain supplementary provisions, and by placing the lesser label of manslaughter, instead of murder, upon reckless but unintended killings with subjective awareness of risk.<sup>460</sup>

The inclusion of depraved-heart killings in the category of murder means that the Pennsylvania pattern creates another kind of anomaly. The result of placing reckless killings (those that are unintentional but committed with subjective awareness of risk) into the category of murder, and creating a lesser included offense that drops the standard all the way down to criminal negligence, is that a gap appears in the hierarchy of offenses, and the levels of homicide cease to correspond to levels of blameworthiness. Crimes that are not comparable to murders, but that are more serious than negligent homicides, are assigned to no category reflecting their seriousness.

The dog-mauling cases in California are examples. Some of these cases unmistakably exhibit *mentes rea* more serious than mere negligence. When actors consciously expose innocent bystanders to animals bred to kill, with awareness of the risk they create and with indifference to it, their subjective mental states are more culpable than negligence. Their crime is not the minor version of homicide corresponding to that lesser *mens rea*. Therefore, one can expect competent prosecutors, who seek to obtain justice in such cases, to attempt to categorize these crimes as murders, especially since they fit the depraved-heart metaphor and supply the subjective awareness component that usually is given as a companion instruction in second-degree murder cases. But the crime of murder seems ill-fitting to address conduct of this kind. These kinds of offenses fit neither the negligence standard nor the label of murder, no matter which of these categories is ultimately chosen, the judgment will represent a stretch. There should be a separate crime of manslaughter that covers a mental state between that of intent and

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<sup>460</sup> See *supra* note 307 and accompanying text.



knowledge at the high end and that of negligence at the low end. This result, however, can be achieved only by legislation. The Model Penal Code shows one way to do it.<sup>461</sup>

***Voluntary Manslaughter: Legislation That Retains the Common Law.*** There is one place, however, where the ancient standards that usually accompany the Pennsylvania pattern are superior to modern conceptions such as the Model Penal Code. Voluntary manslaughter in the MPC depends upon a mental state of “extreme mental or emotional disturbance” for which there is a “reasonable explanation or excuse.”<sup>462</sup> This standard might exonerate, say, a political terrorist from a conviction for mass murder, if the terrorist were to act from deviant versions of religious beliefs that are a “reasonable explanation” of the actor’s emotional disturbance. The MPC’s definition is too diffuse: it is both vague in application and excessively broad in coverage. Many Pennsylvania-pattern States, including California, have avoided this result by retaining the historical formulation of voluntary manslaughter, which in this instance is a better fit.

The common law tradition reduces the grade of a passion offense in a way that is confined to the policy of recognizing human frailty. It is a doctrine of forgiveness that is deontological<sup>463</sup> in nature, rather than utilitarian; it interferes, in fact, with the utilitarian foundations of sentencing and should be confined to instances in which it is needed for fair crime grading. The common law achieves this result by confining the lesser offense to sudden passion that arises from an adequate cause, measured objectively, close in time to the homicide, and precipitated by the victim. A few States, unfortunately, have instead adopted the MPC approach. The common law approach, which can be either codified or preserved by decision, is preferable.

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<sup>461</sup> See *supra* note 307 and accompanying text.

<sup>462</sup> Model Penal Code § 210.3(1)(b) (1962).

<sup>463</sup> See Joshua Dressler, *supra* note 258, at 959-63.

It is arguable that improvements could be achieved by retaining the murder label and adjusting only the sentence and by defining the conditions for the reduction as an affirmative defense so that the burden of proof is placed upon the defendant. These issues are less important, however, and more debatable than the fundamental definition of the concept.

***Felony Murder: Legislative Revision.*** Most States have preserved the felony murder doctrine, possibly because of the policies that it arguably serves. At the same time, the doctrine can result in crime definition that deviates unacceptably from blameworthiness if it is insufficiently limited, and the arguments of the critics thus are also important in defining its contours. This article takes no position on the question whether the doctrine should be preserved, but assumes from current conditions that most jurisdictions will choose to retain it. The remaining question, then, concerns the definition of felony murder. How can it best be described so that it carries out its arguable functions, while minimizing the degree to which some of its applications might detract from the connection between crime and blameworthiness?

First, freeing felony murder from the common law of malice is desirable for the same reasons that it is desirable in other cases.<sup>464</sup> The jury should not be told that “implied malice” arises from felony murder conditions; instead, it should be instructed more straightforwardly: to convict the defendant of murder if the conditions are proved beyond a reasonable doubt, and to acquit if not. Second, the “inherently dangerous felony” doctrine is unworkable and should be replaced, in those States that use it, by legislation requiring “an act clearly dangerous to human life” or the equivalent. The dangerous felony approach results in classifications devoid of rationality and conflicting with each other.<sup>465</sup> It invites nonsensical translations, such as California’s “high probability of death” standard, which few felonies would meet even among

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<sup>464</sup> See *supra* Pt. IIA of this article.

those that concededly are “dangerous.” The dangerous act approach, on the other hand, serves such arguable policies as consistent crime grading, upholding the sanctity of life, deterring dangerous acts, and simplifying crime definition. At the same time, since it depends upon the conduct of the individual defendant, the dangerous act formula avoids disconnecting individual culpability from assignment of guilt, and thus it addresses the most consistent issue raised by felony-murder critics.

A third issue raised by the common law of felony murder is the merger doctrine. States that define felony murder by statute and that confine merger to manslaughter raise difficult issues of crime grading by allowing negligently committed felonies to serve as predicates for murder convictions. To some extent, this difficulty is mitigated by the requirement of an act clearly dangerous to human life, which imposes a requirement that confines felony murder in a relatively consistent way.<sup>465</sup> Also, by construction, courts can extend merger to lesser included offenses within manslaughter, such as negligent homicide. A more difficult question is created by felony murder that is predicated on criminally negligent child injury or on aggravated assault. Texas allows both of these predicates, while California allows neither. Textual and policy arguments support Texas’s approach, but the arguments of critics against felony murder support California’s approach since they seem most applicable to murder convictions predicated on crimes of criminal negligence. At the same time, California’s application of merger to assault, without the provision of a serious-bodily-injury means of committing murder, is inconsistent with the common law that California purports to apply, and its extension of the prohibition to assaultive burglaries is inconsistent with the goal of maximizing the achievement of underlying

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<sup>465</sup> See *supra* Pt. IIA of this article.

<sup>466</sup> See *supra* notes 403-05 and accompanying text.

policies as well as contrary to the majority rule.<sup>467</sup>

***The Case for Comprehensive Legislative Redefinition.*** Legislation to correct these anomalies under the Pennsylvania pattern is highly desirable. They result in both vagueness and poor definition of homicidal crimes. Sound legislation would abolish degrees of murder and the premeditation-deliberation formula. It would abolish the antiquated and dysfunctional symbol of malice aforethought, together with the depraved-heart variety of murder that it implies. In place of these concepts, it would define murder by intent or knowledge. Sound legislation would also include a type of murder based on serious assaults, those intended to produce serious bodily injury, defined as lasting loss of a body feature. A good statute also would recognize passion circumstances in a provision confined by legislatively codified common law restrictions, either in the form of a separate crime of voluntary manslaughter or as a sentence-range reduction.

For homicides not involving intent or passion, sound legislation would create an intermediate lesser-included crime of involuntary manslaughter, characterized by conscious indifference to life: a crime committed with actual awareness of a major risk of death. It might also create a lesser crime of negligent homicide, requiring criminal negligence and depending upon a gross deviation from ordinary conduct, but capable of being supplied by highly inexcusable inadvertence. Finally, if the jurisdiction retains the felony-murder rule, its legislature should replace the “inherently dangerous felony” doctrine with a requirement of “an act clearly dangerous to human life.” It should carefully consider and describe which felonies are to be excluded by merger from serving as predicates. Lesser-included offenses are the first candidates for this merger list. The merged offenses also can sensibly include assault as a prohibited predicate if murder is separately defined to include killings with intent to cause serious bodily

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<sup>467</sup> See *supra* notes 416-21, 430-31 and accompanying text.

injury. And arguably, crimes committed only by negligence should be excluded, although child injury resulting in death poses a set of policy considerations that might merit its exception from the exclusion.

***B. Adjudication: Without Legislation, How Can the Courts Improve Their Jurisprudence?***

***Premeditation: Making Sense of Its Incoherence.*** In the meantime, some issues can be dealt with by judicial evolution. For example, until the legislature is persuaded to act, courts adjudicating the Pennsylvania pattern should forthrightly recognize that complete rationality cannot be achieved together with fidelity to the legislation. As California has demonstrated, efforts to protect the distinction between intent and premeditation by judicially invented factors lead to irrational results. A better solution is to rely on the terms “premeditation” and “deliberation” themselves; to tell juries that no time requirement is implied; to avoid complex attempts to translate these terms into other terminology that is not contained in the statutes; and to tolerate the apparent oxymoron created by the possibility of instantaneous premeditation, as well as the difficulty of distinguishing intent.<sup>468</sup> This approach may well be the one that California finally has chosen to follow. If so, however, California should make a clean break from the mistake it made in *People v. Anderson* by overruling that decision.

***Malice Aforethought: Conceptual Definition, without Misnomer.*** Simultaneously, courts subject to the Pennsylvania pattern could dispense with the inclusion in jury instructions of the misleading symbol created by the phrase, “malice aforethought.” Legislation here should not be necessary because the function of jury instructions is to enable jurors to apply the law consistently to the facts they find. Nothing of value is added by the words “malice

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<sup>468</sup> See *supra* notes 132-44 and accompanying text.

aforethought,” and they interfere with jurors’ understanding of the mens rea for murder.<sup>469</sup> Worse yet, they endanger acceptance of the rest of the charge by implicitly suggesting that the judge’s instructions contain terms that are to be ignored. Full conveyance of the meaning of malice aforethought can be achieved by a charge that tells the jury about intent as one possible mens rea for murder, together with other modalities for supplying the mens rea if they are applicable. Nothing is lost by this approach, and the double misnomer contained in the ancient phrase “malice aforethought” then no longer would create confusion.

***Depraved-Heart Malice: Abandoning the Metaphor.*** The branch of malice encompassing the depraved heart formula is more difficult to deal with in the absence of legislation, but it merits the same basic judicial treatment. Courts subject to the Pennsylvania pattern, with its archaic element of malice, are required as a matter of fidelity to legislative language to honor the kind of murder that the depraved-heart metaphor creates. But as with malice, there is no good reason to continue to use the precise language, “depraved heart,” or “abandoned and malignant heart.”<sup>470</sup> Usually, when jury instructions are given, the depraved-heart terminology is accompanied by more precise language requiring an element such as extreme recklessness, which in turn is made out by a subjective, actual awareness of a high risk of death, or a conscious indifference to that risk, combined with conduct that causally produces a homicide. Jury instructions based on these concepts would preserve the meaning of depraved-heart murder without inviting the potential abuses that could follow from jury concentration on the depraved-heart terminology.

There is little that the courts can do, however, to remedy the legislatively created anomaly that results when depraved heart murder either overlaps with a kind of manslaughter

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<sup>469</sup> See *supra* notes 205-06 and accompanying text.

that also is defined by recklessness, or when there is no intermediate crime between murder and homicides committed by mere negligence. Legislation is probably required in these circumstances to create a hierarchy of crimes that corresponds better to grades of seriousness.<sup>471</sup> The courts can, however, make sure that the rules are clear. In California, where both of these disadvantages are inherent in the jurisprudence—that is, where there is a gap between murder and a lesser crime defined by criminal negligence, and there also is overlap, because the term “recklessness” is confusingly applied to both—the California court could improve both the proportionality and the clarity of these crimes by clearly holding that subjective awareness of risk is required for the greater offense while gross negligence in the form of highly inexcusable inadvertence suffices for the lesser.

***Felony Murder: Preserving Both Its Purposes and Its Connection to Blameworthiness.***

Courts that still use the dangerous felony approach to felony murder should overrule it. This is a court-created doctrine, one that furnishes an adjunct to a court-created type of murder.<sup>472</sup> Its abolition would meet even stringent standards for departure from stare decisis, since it has proved transparently unworkable.<sup>473</sup> In its place, these courts could adopt the dangerous act approach instead. This replacement test would focus upon the conduct of the individual defendant in the particular case, requiring that this conduct include “an act clearly dangerous to human life,” instead of isolating the formal elements of the felony “in the abstract.” Other courts have adopted this kind of test as a matter of common law evolution. It is capable of more

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<sup>470</sup> See *supra* Pt. IIB of this article.

<sup>471</sup> See *supra* notes 306-17 and accompanying text.

<sup>472</sup> See *supra* notes 368-70 and accompanying text.

<sup>473</sup> Departure from stare decisis is particularly justified when no reliance interests are impaired and existing law has proved unworkable. See, e.g., *Payne v. Tennessee*, 501 U.S. 808 (1991). Reliance interests are insubstantial when the defendant commits a prohibited act, a felony, and seeks to avoid conviction for murder when death results, and the California court’s own catalogue of its decisions shows how unworkable the existing rule is. See *supra* note 391 and accompanying text.

consistent results than the dangerous felony approach, and it carries out the policies that arguably support the felony murder rule with less violation of the concern for disconnection between culpability and conviction that critics of the rule raise.

***The Incompleteness of Judicial Solutions.*** But legislation reforming homicide laws from top to bottom is a better path for States subject to the Pennsylvania pattern. The tug of stare decisis, as well as the terms of the existing legislation, will prevent courts from rationalizing many of the most serious disadvantages. To return to an observation that appeared near the beginning of this article, Texas revised its homicide laws in 1973 as part of a comprehensive reform based on the Model Penal Code.<sup>474</sup> The result was neither easy nor cost-free. But today, the people of my State have homicide laws that mean what they say, reflect the people's values, and correspond to degrees of blameworthiness. States that struggle to do justice under the strictures of the Pennsylvania pattern should do the same.

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<sup>474</sup> See *supra* notes 12-14 and accompanying text.